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IN THE

Supreme Court of the United States

October Term, 1949.

No. 40.

UNITED STATES OF AMERICA, *et al.*

v.

CAPITAL TRANSIT COMPANY, *et al.*

No. 41.

WASHINGTON, VIRGINIA & MARYLAND COACH COMPANY, INC., *et al.*

v.

CAPITAL TRANSIT COMPANY, *et al.*

Appeals From the United States District Court for the District of Columbia.

BRIEF FOR CAPITAL TRANSIT COMPANY.

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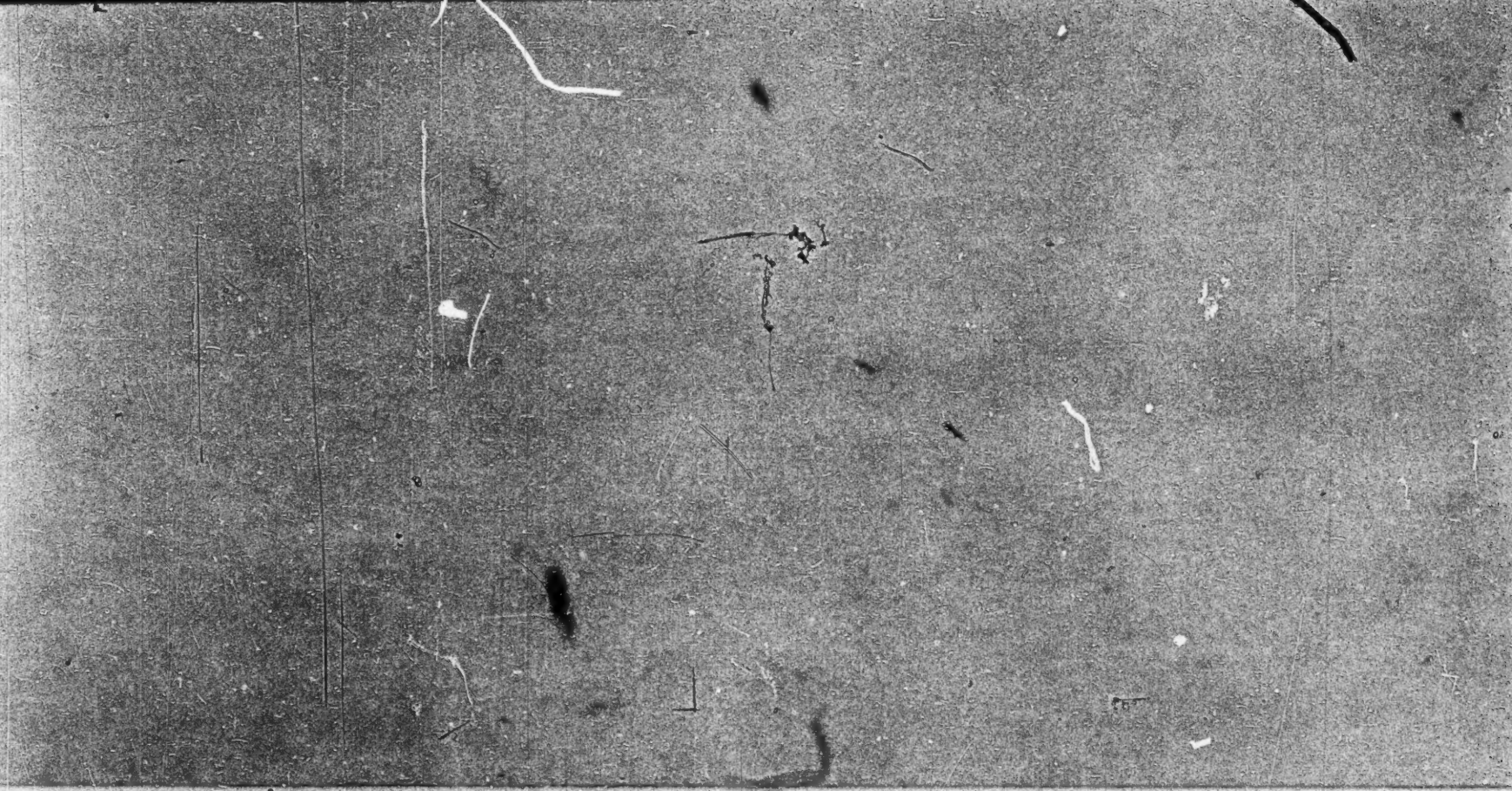

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statement of the Case	2
The Orders Involved	3
History of the Proceedings Before the Interstate Commerce Commission and the Public Utilities Commission of the District of Columbia	4
Existing Operations of Capital Transit	9
The Costs and Losses of Operations	11
The Reports of the Commission	14
The Decision of the District Court	16
Questions Sought to Be Presented	18
Statutes Involved	20
Summary of Argument	20
Argument:	
I. The Interstate Commerce Commission is without jurisdiction and the District Commission has jurisdiction over the Capital Transit service involved and the compensation therefor	28
A. The jurisdictional limitations of Section 216(e)	29
B. The statutory authority and orders of the District Commission	34
C. The decisions of this Court	39
D. The doctrine of *res judicata* or collateral estoppel by judgment is inapplicable	46
E. Lack of evidence to support application of the Act under Section 203(b)(8)	49
II. The Commission's orders require fares and divisions thereof which are confiscatory, unjust, unreasonable, inequitable, and discriminatory; and which are without support by findings or evidence	55

Page

A. Violation of the Fifth Amendment and Section 216 of the Interstate Commerce Act..... 56

B. Discrimination under Section 216 of the Interstate Commerce Act and under the District Public Utility Law..... 62

C. Lack of necessary findings and evidence to support the fares and divisions prescribed by the Commission's order of July 7, 1948..... 65

III. The Commission failed to comply with other statutory limitations and requirements..... 67

A. The rejection of the notice of revocation exceeds the Commission's statutory authority... 67

B. The fixing of divisions retroactively to June 22, 1947, exceeds the Commission's statutory authority 72

C. Effectiveness of orders of July 7, 1948, and May 9, 1947, in less than thirty days renders such orders void 75

IV. The Virginia companies are required to file bonds on appeal 76

Conclusion 76

Appendix 79

TABLE OF AUTHORITIES.

Cases.

Akron, C. & Y. Ry Co. v. United States, 261 U.S. 184.. 66

Arizona Grocery Co. v. Atchison, T. & S. F. Ry Co., 284 U.S. 370..... 68

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 35

Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 233 U.S. 479 ..... 15, 23, 45

Baltimore & O. R. Co. v. United States, 298 U.S. 349.. 47, 56, 60, 66

Baltimore & O. R. Co. v. United States, 43 F. 2d 603... 73

Banton v. Belt Line Ry. Corp., 268 U.S. 413..... 47

Page

Bracht v. San Antonio & A. P. Ry. Co., 254 U.S. 489... 46
Brimstone R. & C. Co. v. United States, 276 U.S. 104.. 27, 66, 73, 75
Capital Transit Co. v. United States, 7 Fed. Car. Cas. 2036 1
Chicago, M. & St. P. Ry. Co. v. Iowa, 233 U.S. 334.... 46
Chicago, M. & St. P. Ry. Co. v. Public Utilities Comm., 274 U.S. 344 61
City of Yonkers v. United States, 320 U.S. 685..... 34
Colorado Interstate Gas Co. v. Federal Power Comm., 324 U.S. 581 61
Colorado-Wyoming Gas Co. v. Federal Power Comm., 324 U.S. 626 66
Commissioner v. Sunnen, 333 U.S. 591.....23, 47, 48
Connecticut L. & P. Co. v. Federal Power Comm., 324 U.S. 515 .....33, 34
Federal Trade Comm. v. Bunte Bros., 312 U.S. 349.... 34
Federal Trade Comm. v. Raladam Co., 316 U.S. 149..23, 48
Florida v. United States, 283 U.S. 212..... 66
Great Northern Ry. Co. v. Sullivan, 294 U.S. 458.... 64
Gulf C. & S. F. R. Co. v. Texas, 204 U.S. 403..... 46
Houston, E. & W. T. Ry. Co. v. United States, 234 U.S. 342 .....21, 32
Interstate Commerce Comm. v. Chicago, G. W. R. Co., 209 U.S. 108 68
Interstate Commerce Comm. v. Inland Waterways Corp., 319 U.S. 671..... 63
Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U.S. 88 .....65, 68
Interstate Commerce Comm. v. Mechling, 330 U.S. 567 26, 63
Interstate Commerce Comm. v. Parker, 326 U.S. 60 .. 38
Keller v. Potomac Electric Power Co., 261 U.S. 428.. 35
National Mutual Ins. Co. v. Tidewater Transfer Co., (U.S.) 69 S. Ct. 1173 35
New York v. United States, 331 U.S. 284..... 56
New York Central R. Co. v. Mohney, 252 U.S. 152.... 46
North Carolina v. United States, 325 U.S. 507..... 66
Northern Pacific R. Co. v. North Dakota, 236 U.S. 585. 61
O'Donoghue v. United States, 289 U.S. 516..... 35
Omaha & C. B. St. R. Co. v. Interstate Commerce Comm., 230 U.S. 324..... 37

Page

Panhandle Eastern Pipe Line Co. v. Public Service Comm., 332 U.S. 507 34
Passenger Fares Between D. C. and Nearby Va., 258 ICC 559 48
Pennsylvania R. Co. v. Knight, 192 U.S. 21 46
Port Richmond Ferry Co. v. Bd. of Chosen Freeholders, 234 U.S. 317 34
Powell v. United States, 300 U.S. 276 ..... 27, 69
St. Louis S. W. Ry. Co. v. United States, 245 U.S. 136 ..... 44, 45, 69
Skinner & Eddy Corp. v. United States, 249 U.S. 557 .. 68
Smith v. Illinois Bell Tel. Co., 282 U.S. 133 61
Southern Pacific Co. v. Arizona, 249 U.S. 472 46
Terminal Taxicab Co. v. Kutz, 241 U.S. 252 46
Texas & P. Ry. Co. v. United States, 289 U.S. 627 45
United States v. Baltimore & O. S. W. R. Co., 226 U.S. 14 30
United States v. Baltimore & O. R. Co., 293 U.S. 454 .. 66
United States v. Baltimore & O. R. Co., 284 U.S. 195 ..... 27, 28, 73, 75
United States v. Capital Transit Co., 325 U.S. 357 .... 14, 15, 22, 23, 24, 42, 43, 46, 51
United States v. Carolina Freight Carriers Corp., 315 U.S. 475 66
United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499 66
United States v. Illinois Central R. Co., 263 U.S. 515 .. 68
United States v. Pennsylvania R. Co., 323 U.S. 612 ... 44
United States v. Resler, 313 U.S. 57 55
United States v. Yellow Cab Co., 332 U.S. 218 .... 15, 22, 39, 42, 43, 46
Virginia Ry. Co. v. United States, 272 U.S. 658 ..... 44, 45
Washington, D. C. Commercial Zone, 3 MCC 243, 48 MCC 460 50
Woods v. Cloyd W. Miller Co., 333 U.S. 138 54

Constitution.

Article I, Section 8, Clause 3 ..... 21, 34
Article I, Section 8, Clause 17 34
Fifth Amendment 19, 25, 55, 56
Ninth Amendment 54
Tenth Amendment 54

Page

Statutes.

District of Columbia Code, 1940:

Sections: 43-111 ..... 35, 83
43-122 ..... 36, 84
43-207 ..... 36, 84, 90
43-301 ..... 26, 63, 85
43-329 ..... 26, 36, 63, 85
43-411 ..... 36, 85
43-704 ..... 7, 86
43-902 ..... 26, 36, 63, 87
43-911 ..... 36, 88
44-202 90

Interstate Commerce Act:

Part I: 37
Section 15(3) [49 U.S.C. § 15(3)] 37, 79
Part II (Motor Carrier Act): 19, 21, 32, 33, 34, 37
Sections: 202(b) [49 U.S.C. § 302(b)] 16, 32, 33, 80
203(a)(8) [49 U.S.C. § 303(a)(8)] 31, 80
203(a)(10) [49 U.S.C. § 303(a)(10)] 32, 79
203(a)(13) [49 U.S.C. § 303(a)(13)] 22, 37, 80
203(b)(8) [49 U.S.C. § 303(b)(8)] 19, 23, 24, 48, 49, 50, 54, 79
204(a)(4a) [49 U.S.C. § 304(a)(4a)] 15
206 [49 U.S.C. § 306] 15, 54
206(a) [49 U.S.C. § 306(a)] 33, 54, 80
207(a) [49 U.S.C. § 307(a)] 55, 81
216 [49 U.S.C. § 316] 25, 29, 55, 56, 62, 79
216(c) [49 U.S.C. § 316(c)] 60, 61
216(d) [49 U.S.C. § 316(d)] 26, 60, 61, 62
216(e) [49 U.S.C. § 316(e)] 16, 18, 20, 21, 26, 29, 30, 31, 32, 33, 47, 49, 60, 62, 65
216(f) [49 U.S.C. § 316(f)] 26, 27, 60, 61, 65, 72, 73, 74
216(g) [49 U.S.C. § 316(g)] 27, 68
216(i) [49 U.S.C. § 316(i)] 60, 62
217(a) [49 U.S.C. § 317(a)] 27, 70, 71, 82
217(c) [49 U.S.C. § 317(c)] 27, 68, 71, 82
221(b) [49 U.S.C. § 321(b)] 10, 75, 83

	Page
United States Code, Title 28:	
Sections: 1253	59
2072	75
2101(b)	59
Act of May 23, 1908 (35 Stat. 250)	37, 90
Act of March 4, 1913 (37 Stat. 974)	17, 21, 22, 35
Joint Resolution of January 14, 1933 (47 Stat. 752)	17, 19, 22, 37, 88
Joint Resolution of July 25, 1947 (Public Law 239, Ch. 372)	53

Rules.

Supreme Court Rules: 9	18
13	18
36	75
Federal Rules of Civil Procedure: 8	58
65(b)	59
72	75
Interstate Commerce Commission Rules:	
49 C.F.R. § 186.0	71
49 C.F.R. § 186.15(b)	71
49 C.F.R. § 186.15(d)	71

Miscellaneous.

79 Congr. Rec. 5735-7	33
H. Rept. No. 1645, 74th Congr., 1st Sess.	33, 61
S. Rept. No. 482, 74th Congr., 1st Sess.	33
S. Rept. No. 339, 80th Congr., 1st Sess.	53

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OPINION BELOW.

The opinion, findings, and conclusions of the statutory three-judge United States District Court for the District of Columbia are not officially reported but are unofficially reported in *Capital Transit Co. v. United States, et al.*, 7 Federal Carriers Cases 2036. They appear in the printed record at pages 98-106.

JURISDICTION.

The order and judgment of the District Court was entered on December 8, 1948 (R. 321-322). Petitions for appeal were filed and allowed; and the appeals were docketed in this Court as Nos. 629 and 630, respectively, in the October, 1948, Term. Motions to Dismiss or Affirm were filed by all appellees. This Court noted probable jurisdiction by order dated April 18, 1949 (R. 1276).

STATEMENT OF THE CASE.

Appellants' statement of the facts of the cases omits much that is material to consideration of the final disposition of the cases that the Government requests. (Gov't. Br., pp. 33-35) Since the final disposition so requested involves many questions in addition to the simple question of statutory jurisdiction decided by the District Court, it is necessary to bring to the attention of this Court a more complete statement of the facts than would otherwise be necessary.

Capital Transit Company ("Capital Transit") is a mass transportation carrier engaged in the local transportation of passengers from one point to another within the District of Columbia by street railway and motor bus. The major portion of its transportation operations and business within the District is carried on by means of its street railway facilities. (R. 1, 66, 100) It does not hold itself out to render service to persons travelling between points in the District and Virginia points, other than local service within the District. (R. 371) Alexandria, Barcroft and Washington Transit Company ("A. B. & W."), and Washington, Virginia and Maryland Coach Company, Inc. ("W. V. & M.") are engaged in the transportation of passengers by motor bus between points in Virginia and between points in Virginia and designated terminal points in the downtown business section of the District. (R. 100)

The Orders Involved.

The order and judgment of the District Court set aside and enjoined three related orders of the Interstate Commerce Commission ("Commission").

The first order of the Commission set aside and enjoined by the District Court was issued on June 22, 1945, in Docket No. 28991. (R. 11-12) That order required Capital Transit to establish and maintain fares (subsequently described by the Commission as a "joint fare" (R. 51-52), with A. B. & W. and W. V. & M. (the "Virginia companies") for service between points in the District of Columbia and certain points in Arlington County, Virginia. The required fares were not to exceed 13⅓ cents per one-way trip and included free transfer privileges between the street railway and motor bus lines of Capital Transit within the District. (R. 100) No divisions of the prescribed fares for Capital Transit were prescribed by that Order.

The second order of the Commission set aside and enjoined by the District Court was issued on May 9, 1947, in Docket No. MC-C-891. (R. 54-55) That order rejected for filing a Capital Transit notice of revocation of its concurrences in tariffs filed by the Virginia companies under the Commission order of June 22, 1945. (R. 100-101)

The third order of the Commission set aside and enjoined by the District Court was issued on July 7, 1948, in reopened Docket No. 28991. (R. 140-142) By this order the Commission superseded and modified its order of June 22, 1945, in the same Docket so as to require the maintenance of a joint fare between Capital Transit and the Virginia Companies and to permit an increase in such joint fare to a maximum of 16 cents per one-way trip, including transfer privileges between Capital Transit lines within the District. *The order of July 7, 1948, also for the first time fixed the compensation of Capital Transit for its part of the service wholly within the District.* This compensation was fixed at 7 cents per trip as a division of the prescribed 16 cent fare. The order of July 7, 1948, further fixed the Capital Transit

division of the 13⅓ cent fare established by the order of June 22, 1945, at 5.83 cents, retroactively to June 22, 1947. (R. 102-103)

Based upon a finding, among others, by the District Court that Capital Transit's costs of rendering the service required under the Commission's orders of June 22, 1945, and July 7, 1948, exceeded the compensation prescribed for the Company by the order of July 7, 1948, the court issued an interlocutory injunction against such order. (R. 171-173) This interlocutory injunction was issued on condition that Capital Transit continue honoring the joint fare tickets upon payment by the passenger of 3 cents cash and that Capital Transit furnish an appropriate refund receipt. (R. 173) This condition was subsequently modified to require the payment of 6 cents cash.[1] (R. 251-252)

History of the Proceedings Before the Interstate Commerce Commission and the Public Utilities Commission of the District of Columbia.

Much of the history of the proceedings before these two commissions is contained in the District Court's findings of fact (R. 100-103), which are based upon uncontradicted evidence. For the convenience of this Court we herewith summarize those findings and add supplementary facts where necessary, with appropriate annotations to the record.

Shortly after the issuance of the Commission's order of June 22, 1945, and under its compulsion, the Virginia companies filed tariffs with the Commission containing joint

[1] The argumentative statements in the Government's Brief (pp. 8-9, 34) purporting to outline the present situation under the interlocutory injunction ignore the available weekly pass issued by Capital Transit providing for service at a reduced rate for frequent users. The pass rate has been used by a substantial number of persons even when the lower joint fare prescribed by the Commission was available without extra cash payments. (Exh. 149, R. 1159) The interlocutory injunction permits the collection of an amount equivalent to the local fares of Capital Transit, in lieu of the lower division fixed by the Commission, to prevent irreparable damage *pendente lite*. (R. 172)

fares with Capital Transit at the 13⅓ cent rate for the joint service required by the Commission. (R. 100, 431-433, 435-437) In lieu of filing its own tariff with the Commission, Capital Transit filed concurrences in the tariffs filed by the Virginia companies (R. 100). The concurrences were expressly limited to the maximum 13⅓ cent fare prescribed by the order of June 22, 1945. Furthermore, such concurrences expressly reserved to Capital Transit the right of revocation on appropriate notice. (R. 100, 438, 439-440)

After the concurrences had been filed, the carriers agreed to a division of the 13⅓ cent fare under which Capital Transit received 5.833 cents and the Virginia companies the balance. (R. 100-101, 929-931, 940-942) The division agreement was subject to the express understanding that the compensation agreed upon for Capital Transit was subject to the approval of the Public Utilities Commission of the District of Columbia ("District Commission"). (R. 101, 931, 942) Approval of the compensation agreed upon for Capital Transit was never obtained from the District Commission. (R. 101, 128) On the contrary, such compensation of 5.833 cents per ride was expressly disapproved and prohibited by the District Commission's Order No. 3209, dated June 11, 1947. (R. 62-63, 101)

By appropriate notices, dated February 26, 1947, and March 6, 1947, and in accordance with the terms of its concurrences, Capital Transit cancelled and revoked such concurrences in the joint tariffs of the Virginia companies. (R. 101, 398-399) On February 26, 1947, Capital Transit notified the Commission that it did not wish to make application for or perform interstate service to and from Virginia under a certificate of convenience and necessity (R. 396), and its then existing temporary authority from the Commission expired on March 31, 1947. (R. 101, 396) The Secretary of War petitioned the Commission on March 14, 1947, to require Capital Transit to continue its service to the Pentagon Building in Virginia. The Company advised the Commission that it based its abandonment of such ser-

vice on the fact that the Commission's order imposed an undue financial burden upon the Company; the fact that the Company was "not able properly to continue to perform such service without impairing its ability to render adequate service to persons depending upon it for local transportation service within the District of Columbia and nearby Maryland"; and the fact that service to and from the Pentagon had "long been at the expense of good service to other essential departments of the Government." (R. 399-400) The Commission denied the petition of the Secretary of War on March 26, 1947. (R. 401-402)

On April 1, 1947, Capital Transit discontinued all of its interstate motor bus operations across the Virginia State line that it had theretofore engaged in prior to, and at the time of, the Commission's Order of June 22, 1945. (R. 101, 1261)

On April 15, 1947, by an order to show cause why the Capital Transit revocation notice of March 6, 1947 should not be rejected for filing, the Commission initiated the proceedings in its Docket No. MC-C-891. (R. 347-348) Pursuant to such order, the Commission held proceedings (R. 352-396) in which it refused to permit the receipt of detailed evidence showing the unlawfulness and unreasonableness of the fares prescribed by its order of June 22, 1945, in its Docket No. 28991 (R. 354, 355, 364, 368, 373-376, 380).

On May 7, 1947, Capital Transit petitioned both the Interstate Commerce Commission (R. 47-48) and the District Commission (R. 55-60) for declaratory orders on the question of the respective jurisdiction of such commissions over the rates, fares, and compensation for the remaining service of Capital Transit from one point to another within the District after cessation of its Virginia operations. (R. 58-59, 101, 404) The Commission refused to decide such issue, denied such declaratory relief, and issued its order of May 9, 1947 in its Docket No. MC-C-891, rejecting for filing the Capital Transit revocation notice of March 6, 1947. (R. 53, 55, 101)

The District Commission, however, issued its Findings, Opinion, and Order No. 3209, dated June 11, 1947, in response to Capital Transit's petition. (R. 60-63) The District Commission found that the compensation received by Capital Transit, under the division agreements between the carriers dividing the 13⅓ cent fare established under the Interstate Commerce Commission Order of June 22, 1945, was in violation of the Congressional Act creating the District Commission and prohibiting discrimination and the collection of any such compensation for service within the District less than the fares prescribed by the District Commission. (R. 61-62, 101-102) The District Commission thereupon ordered and determined, effective as of June 22, 1947 (R. 62-63):

> (a) That the transportation of passengers by Capital Transit from one point to another within the District is subject to the jurisdiction of the District Commission, irrespective of whether or not such passengers may have origins or destinations from or to points without the District via the lines of other carriers; and
>
> (b) That the fares or compensation to be charged, demanded, collected or received by Capital Transit for service rendered or to be rendered by it from one point to another within the District, to passengers travelling between points in the District and points in Virginia, shall be no greater nor less than 10 cents cash or a weekly pass to be sold at $1.50, as authorized by the District Commission.

By letter dated June 17, 1947, Capital Transit notified the Virginia companies of the District Commission's Order No. 3209[2] and demanded of them 10 cents cash for each

[2] The Government implies that the Virginia companies had no notice of this order. (Gov't. Br. p. 5, note 2) It relies upon a statement by the Commission to this effect. (R. 128) The record citations to the text herein show, however, that the Virginia companies had ample notice in time to file an application for reconsideration of the District Commission's order, as provided by Section 43-704, D. C. Code, 1940, but did not do so. (R. 102)

joint fare ticket used on its lines within the District as its compensation under the joint fares. (R. 102, 932-933, 935-936) The Virginia companies refused to pay the 10 cents demanded. (R. 102, 123, 124) They made no application for reconsideration of Order No. 3209 (R. 102) but petitioned the Interstate Commerce Commission to vacate and set aside its order of June 22, 1945, in its Docket No. 28991. (R. 102, 440-444, 444-451) Capital Transit joined in the prayer to vacate such order. (R. 452) There was no request in any of such petitions for a determination of just and reasonable divisions between Capital Transit and the Virginia companies. The Commission denied the petitions of the Virginia companies but, on October 6, 1947, reopened its Docket No. 28991 for further hearings. (R. 102, 459-460) Such order also broadened the investigation to include for the first time the issue of the lawfulness of the divisions of the joint fares prescribed by the Commission. (R. 460)

The District Commission filed a motion with the Interstate Commerce Commission to vacate the orders in its Docket No. 28991 and to dismiss the proceeding for lack of jurisdiction. (R. 461-462, 610) After hearing, the Commission issued its Order of July 7, 1948, requiring maintenance of joint fares at 16 cents per trip and fixing the Capital Transit division of this joint fare at 7 cents. The same order also fixed the Capital Transit division of the 13⅓ cent joint fare retroactively at 5.83 cents. (R. 140-142)

In accordance with the order of July 7, 1948, the Virginia companies filed supplements to their joint tariffs cancelling the 13⅓ cent fare and establishing the maximum 16 cent fare, effective August 2, 1948. (R. 103) Before the effective date of the fare changes, Capital Transit notified the Virginia companies and the Commission, on July 20, 1948, that the Capital Transit concurrences in such joint tariffs had been cancelled and revoked; that in any event such concurrences by their terms did not apply to any fares established in accordance with the order of July 7, 1948; and that Capital Transit did not concur in, but objected to, the supplements to the joint tariffs filed by the Virginia

companies. (R. 103, 142-143) In addition, another notice of revocation of the Capital Transit concurrences was filed as a precautionary measure. (R. 143-144)

On July 20, 1948, the District Commission notified Capital Transit that, in view of the Interstate Commerce Commission's order of July 7, 1948, Capital Transit must cease and desist from honoring any joint fare tickets applicable to the lines of the Company in order to comply with the District Commission's Order No. 3209 and other outstanding rate orders of the District Commission. (R. 103, 144-145)

By Opinion and Order No. 3422, dated October 1, 1948, the District Commission found that the Interstate Commerce Commission's Order of July 7, 1948, would result in discrimination against other passengers using the facilities of Capital Transit within the District who do not use the joint fare to points in Virginia and would constitute a preference to those passengers using such facilities in travelling to and from Virginia. (R. 103, 308, 1261-1262) In its Order No. 3422, the District Commission authorized cash fares for transportation from one point to another within the District at 13 cents per ride, with three tokens for 35 cents, and a weekly pass for $1.75 (R. 103, 1272).

Existing Operations of Capital Transit.

The operations of Capital Transit, with respect to journeys of persons travelling between points in the District and points in Virginia, which have been conducted since the abandonment of Capital Transit service into Virginia, is best summarized by findings 17 and 18 of the three-judge District Court which we quote[3] (R. 103-104):

[3] For the convenience of the Court we have inserted uncontradicted supporting record references. The Government in its Brief (pp. 3-4) argumentatively asserts that the Pentagon Building and other Virginia points continue to be "jointly served" by Capital Transit. But this assertion only begs the argument with respect to the question relating to the jurisdiction of the Commission to require joint rates for an assumed joint service. The Government's assertions are contrary to the uncontradicted evidence. (R. 61, 72, 618-619, 1261)

"17. On April 1, 1947 Capital Transit Company discontinued all of its motor bus operations across the State line between points in the District of Columbia and points in Arlington County, Virginia [R. 50-51, 61, 126-127, 370, 1261]; and since that date all transportation by Capital Transit Company, of persons travelling between points in the District of Columbia and points in Arlington County, Virginia, has been conducted wholly from one point to another within the District; and the Company no longer renders service across the Virginia State line to such persons [R. 370-372, 693, 856, 1261]. Such transportation service by Capital Transit Company to such persons to and from the downtown terminal points of the Company's bus and streetcar lines within the District is no different from and is indistinguishable from and intermingled with the other local transportation services furnished by the Company to all other persons within the District. [R. 61-62, 371, 859, 1261] Capital Transit Company is engaged in the intrastate transportation or intra-District transportation of passengers over the entire length of all of its routes within the District used by persons travelling to or from Virginia points via the lines of the Virginia Companies, under rules and regulations and at rates prescribed by the District Commission; such Capital Transit Company lines are not limited to such persons travelling to and from Virginia points; and the transportation service rendered to such persons by Capital Transit Company is casual and incidental to its other local operations within the District." [R. 61, 371, 859, 862, 1261]

"18. Capital Transit Company has no physical connections, coordination, arrangements for through transportation service or interchange of passengers, or common terminal points with either of the Virginia Companies. At no time has it voluntarily engaged in the joint transportation of passengers with either of the Virginia Companies. The passengers on the Virginia lines are free to come and go from the terminals of such lines within the District of Columbia by means other than the transportation service of Capital Transit Company which may be rendered in the vicinity of such terminals. There is no relation in time or continuity between the transportation service on the

lines of Capital Transit Company within the District and the transportation service on the lines of the Virginia Companies terminating in the District." [R. 61, 371-372, 618-619, 773, 1008, 1028, 1030, 1261]

The foregoing findings by the District Court do not con- with any findings of fact made by the Interstate Com- erce Commission and are in complete harmony with find- gs made by the District Commission. (R. 61, 1261)

The Costs and Losses of Operations.

As found by the Commission in its Report of July 7, 1948, he Virginia lines are operating at a loss, and the Transit mpany has sustained substantial reductions in earn- gs." (R. 138) This finding with respect to Capital ansit was based upon findings that from 1943, the year last consideration by the Commission, to 1947 the Capital ansit ratio of operating expense to operating revenues mped from 71.6% to 91.6%. (R. 136) The Commission rther found that, notwithstanding a fare increase allowed pital Transit by the District Commission in May, 1947 ee R. 19-42), "the unfavorable trend in its earnings con- ued;" and that "In September 1947, this respondent's pense per car-mile had increased by 53.6 percent, and per s-mile, by 67.8 percent, over that in 1943." (R. 137) It conceded that "the existing fares were inadequate to et the companies' increased expenses." (Gov't. Br. 5)

The uncontradicted evidence of record supplements the mmission's findings and shows that the costs incurred Capital Transit in rendering service under the joint res prescribed by the Commission far exceed the reve- es received from such service.

At the proceeding in Docket No. MC-C-891 before the mmission in April, 1947, it was testified that the reve- es of Capital Transit were insufficient to meet its costs a substantial amount and that the revenues received it for service within the District to persons travelling be- een points in the District and Virginia points via the

lines of the Virginia companies were insufficient to cover the costs incurred by the Company in rendering its part of that service. (R. 374) The Commission refused to allow opportunity to amplify such testimony with details. (R. 373-376, 380)

At the hearings in Docket No. 28991 before the Commission in November, 1947, it was shown that the effect of a retroactive wage award from July 1, 1947, was to cause the company to operate with a deficit on an annual basis. (R. 853-855) Evidence introduced by the Commission shows that the 1947 operating income of $238,938 found by the Commission (R. 136) was insufficient to pay the interest on the Company's funded debt, which interest amounted to $425,898 in 1947. (R. 1183-1184)

It was further shown that the Capital Transit cost, including cost of capital as return, of rendering service under the joint fares was 11.664 cents per passenger, or 9.968 cents per passenger without including any return on investment in property used therefor. (R. 856-857; Exh. 135, R. 934) The loss sustained by Capital Transit from such service, with revenues at 5.83 cents per passenger, as fixed retroactively by the Commission's order of July 7, 1948, was 4.135 cents per passenger or $63,716 annually, without inclusion of any return. (R. 857; Exh. 135, R. 934) The Commission recited and referred to this evidence in its Report of July 7, 1948, without criticism or contradictory findings (R. 137). There is no evidence of record to the contrary. The apportionment of costs of service to the service regulated under the Commission's orders was based upon the facts that such service was and is no different from the service rendered to all other passengers within the District and that the costs per passenger so apportioned are dependent upon the same facts and are the same in all cases. (R. 859, 873, 879, 1261)

At the hearing before the District Court in August, 1948, on motion for an interlocutory injunction, it was shown that the average costs of Capital Transit, in rendering service under the joint fares prescribed by the Commission, were

"not less than 9.721 cents per passenger," without inclusion of any return and that Capital Transit would suffer a loss of not less than $4,635 per month on the 7 cent division of the 16 cent fare prescribed by the Commission's order of July 7, 1948. (R. 158) In granting the interlocutory injunction the District Court found as a fact (R. 172):

> "That uncontradicted evidence in the record shows that the average cost to plaintiff justly apportionable to transporting from one point to another within the District of Columbia, persons who travel to or from said Virginia points, using the facilities of said Capital Transit Company, is not less than 9.721 cents per passenger, without the inclusion of any sum as compensation for the use of plaintiff's property in such services; and that if the allocation to the plaintiff of the sum of seven cents (7¢) from the joint fare prescribed in said order of July 7, 1948 were continued, the plaintiff would suffer therefrom a loss of not less than $4,635 per month."

In October, 1948, the District Commission found that the earnings of Capital Transit were inadequate, a condition which, if continued, would be prejudicial to the credit standing of the Company (R. 1260). The District Commission also found that the earlier increase in fares granted in 1947 had been "nullified by mounting costs of operation, due, in large measure, to increases in wages of operators" and that "a recurrence of this situation is not improbable". Accordingly, the District Commission authorized in part the increases in fares requested by the Company. (R. 1272) In this proceeding, the District Commission found further that the losses suffered by Capital Transit during the period June 22, 1947, to August 2, 1948, from application of the 5.83 cents division to the joint fare service as fixed retroactively by the Interstate Commerce Commission's order of July 7, 1948, were $83,297; and that, to the extent the order of July 7, 1948 were sustained, higher rates would, in order to recover such losses, have to be charged and collected from passengers other than those using the facilities of the Company in the District in the course of journeys to and from Virginia. (R. 1261-1262)

The Reports of the Commission.

Two Reports were issued by the Commission: the first was issued in connection with its order of May 9, 1947, in its Docket No. MC-C-891; the second, in connection with its order of July 7, 1948, in its Docket No. 28991. (R. 48-54, 125-140) Commissioners Miller and Mitchell dissented from the first Report of May 9, 1947, without opinion (R. 54). They were joined by Commissioner Patterson in dissent from the second Report of July 7, 1948, on the point that "continuance of the joint fare between the Transit Company and Virginia Lines should not be required."[4] (R. 140) As we develop in appropriate parts of the argument hereinafter, the Commission's Reports in general entirely lack findings essential to the statutory authority purported to be exercised, and many of the statements and conclusions contained therein lack substantial supporting evidence of record. We herewith summarize those Reports.

In its first Report of May 9, 1947, the Commission briefly discussed the events leading to the initiation of the proceeding in its Docket No. MC-C-891 (R. 49-50). On the question whether it had jurisdiction over the operations of Capital Transit, the Commission relied upon the earlier decision by this Court in *United States* v. *Capital Transit Co.*, 325 U. S. 357. (R. 50-51) It refused to consider the question of the unreasonableness of the joint fares. (R. 51) Finally, the Commission held that the effect of the Capital Transit notice of revocation would be the collection of a combination of fares exceeding the joint fares prescribed by its order of June 22, 1945, in its Docket No. 28991 and that such revocation notice "would" require publication of fares in violation of its earlier order.[4] (R. 52-53) Upon this basis the Commission held that, in lieu of exercising its statutory power of suspension and hear-

[4] The Government in its Brief is not so certain that this "would" be the necessary result. It states that such a revocation notice merely "could" have resulted in fares in violation of the Commission's earlier order. (Gov't. Br., p. 6, note 4)

ing on the lawfulness of the resulting fares, it would reject the notice of revocation for filing. (R. 52, 53)

In the second Report of the Commission, dated July 7, 1948, it cited only a portion of the history of the matter. (R. 126-129) Relying on *United States* v. *Capital Transit Co., supra; Baer Bros. Mercantile Co.* v. *Denver & R. G. R. Co.*, 233 U. S. 479; *United States* v. *Yellow Cab Co.*, 332 U. S. 218; two of its own decisions, and the implications it found in Sections 206 and 204 (a) (4a) of the Interstate Commerce Act, the Commission held that it had jurisdiction to regulate the local transportation service of Capital Transit wholly within the District as a part of "interstate commerce" by the prescription of joint fares therefor. (R. 129-131) The Commission further held that the evidence in the reopened hearing was "along the same lines" as the evidence in the prior hearings, which evidence was held, in *United States* v. *Capital Transit Co., supra*, to support the Commission's finding as of that time that application of the Act was necessary in order to carry out the national transportation policy. (R. 131-132) The Commission concluded, without further discussion or findings on the evidence, that "continued regulation of all fares in issue is necessary in order to carry out the national transportation policy." (R. 132-133)

The Commission discussed at length and made the findings referred to above in connection with the poor financial condition of all of the carriers involved (R. 137-138). After finding that the Virginia companies were operating at a loss and Capital Transit had sustained substantial reductions in earnings the Commission concluded on this subject (R. 138):

> "It is obvious that the respondents cannot continue their services indefinitely under adverse financial conditions. It is inevitable that without relief their services will deteriorate to a point where the inconvenience to their patrons will greatly exceed the burden resulting from any reasonable increase in fares. The

record establishes that since the time the present fares were prescribed respondents have experienced substantial increases in wages and other expenses and, at least in the case of the Virginia Lines, the revenues derived from operations between Washington and the Virginia installations represent an important part of their total revenues."

Without further discussion or findings showing how it arrived at its conclusion, the Commission concluded that joint fares of Capital Transit and the Virginia companies should not exceed 16 cents per trip. (R. 138).

The Commission further held, with no explanation, that it had authority to determine the lawfulness of the divisions of 13-1/3 cent joint fare retroactively to June 22, 1947, under Section 216(f) of the Act. (R. 138-139) It held that the record afforded no basis for changing the divisions of the 13-1/3 cent fare and that the divisions of both the 13-1/3 cent fare and the 16 cent fare should reflect the same proportion as the agreed to divisions of the 13-1/3 cent fare. (R. 139-140)

The Decision of the District Court.

The three-judge District Court decided only a simple question of statutory jurisdiction as between the Interstate Commerce Commission and the District Commission[5] (R. 98-99, 104-106). It held that (R. 98-99, 252):

"* * * the Interstate Commerce Commission is without jurisdiction to make the orders here in question,

[5] The District Court directed argument to be made first on the question of the jurisdiction of the Interstate Commerce Commission to enter any order concerning rates of Capital Transit with respect to the transportation involved in the particular case. (R. 282) After hearing argument from Capital Transit limited to the effect of the proviso to Section 216(e) and Section 202(b) of the Act (49 U. S. C. § 316(e) and 302(b)), the District Court directed argument by the Government (R. 295) and then found it unnecessary to hear the remaining points advanced by Capital Transit. (R. 307).

and that the regulatory power in respect to the matter in controversy lies with the Public Utilities Commission for the District of Columbia, *United States* v. *Yellow Cab Co.*, 332 U. S. 218; United States Code, Title 49, Section 316(e) (proviso)."

The District Court's conclusions of law show that it held the entire transportation of Capital Transit involved in the Commission orders to be "intrastate transportation" within the meaning of the proviso to Section 216(e) of the Interstate Commerce Act (R. 104); that the Commission has no jurisdiction to regulate the compensation of Capital Transit for such intrastate transportation within the District for any purpose whatever (R. 105, 106); and that such intrastate transportation is too unrelated to interstate commerce to constitute a part thereof. (R. 105) The District Court further held that such intrastate transportation and the regulation of the compensation therefor are within the jurisdiction of the District Commission. The District Court based this holding on an Act of Congress appearing in Title 43, Sections 101-1007, D. C. Code (1940), on another Act of Congress known as the Merger Act of January 14, 1933 (Pub. Res. No. 47, 72nd Congr., 47 Stat. 752) and on the conclusion that various specific sections of those Acts granted jurisdiction to the District Commission over such transportation service and transfer arrangements. (R. 105) Its conclusion that the Commission had no jurisdiction (R. 106) and its final decree (R. 321-322) were limited so as to apply to the Commission's orders only insofar as they relate to Capital Transit's service and the compensation therefor.

The District Court specifically held that Order No. 3209 of the District Commission was within that Commission's jurisdiction and statutory authority under the above mentioned Acts of Congress. (R. 105-106) This latter conclusion of law is not assigned as error by the Government, although all of the other conclusions on substantive questions were specifically assigned as error. (R. 325-326)

QUESTIONS SOUGHT TO BE PRESENTED.

The broad scope of the assignments of errors (R. 325-326, 340-344), and the final disposition of the case urged by Appellants (Gov't. Br., pp. 33-35), raise additional questions beyond the scope of the narrow question considered and decided by the District Court. Deciding as it did that the Commission had no jurisdiction under the proviso to Section 216(e) of the Act to regulate the compensation of Capital Transit for its "intrastate transportation" involved, the District Court was not required to decide other independent jurisdictional questions and other questions as to the unlawfulness or confiscatory nature of the Commission's orders raised by Capital Transit (R. 282). Nor should this Court undertake to finally determine questions on which neither argument nor full hearing was permitted by the Court below and which were not decided.

Nevertheless, Appellants urge this Court to hold that the Commission's orders were lawful in all respects. This contention necessarily raises many questions as to the unlawfulness of such orders in addition to the narrow issue of jurisdiction determined by the District Court.[6] We submit that the only question properly presented by these appeals is:

Did the District Court err in holding, under the proviso to Section 216 (e) of the Interstate Commerce Act and the Acts of Congress granting authority to the District Commission, that the Interstate Commerce Commission is without jurisdiction and that the District Commission has jurisdiction over the Capital Transit service involved and over the compensation therefor?

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[6] The "Questions Presented", as stated in the Government's Brief, p. 2, are not the same as the assignments of errors and the points relied upon, filed under Rules 9 and 13 of this Court. Indeed, the second question argued by the Government is not included in either the assignment of errors or in the points to be relied upon.

The comparable question, as stated by the Appellants (Gov't. Br., p. 2, paragraph 1; Va. Co. Br. p. 2), begs the real question before the Court. The jurisdictional question presented relates only to the intra-District service of Capital Transit. There is no question relating to the interstate service of the Virginia companies. The judgment of the District Court below enjoined the operation of the Commission's orders only insofar as they relate to the Capital Transit service and compensation (R. 321-322).

If other questions as to the lawfulness of the Commission's orders are to be considered the following additional questions are presented:

(1) Was there any substantial evidence to support the Commission's conclusion that the exempting provisions of Section 203(b)(8) of the Interstate Commerce Act are not applicable to Capital Transit?

(2) Whether the Commission's orders require fares and divisions thereof which are confiscatory, unjust, unreasonable, inequitable, and discriminatory, in violation of the Fifth Amendment to the Constitution of the United States and the provisions of the Interstate Commerce Act and the District Public Utility Law; and whether such fares and divisions were determined without supporting findings or evidence.

(3) Other questions relating to the Commission's noncompliance with statutory limitations and requirements are as follows:

(A) Does the Commission have authority to reject a notice of revocation of concurrences in joint tariffs?

(B) Did the Commission have authority to fix divisions retroactively to June 22, 1947, by its order of July 7, 1948?

(C) Are the Commission's orders of July 7, 1948, and May 9, 1947, void, under the provisions of Section 221(b) of the Interstate Commerce Act, because made effective in less than thirty days from the date of such orders?

STATUTES INVOLVED.

The provisions of the Interstate Commerce Act, to the extent not printed in the Appendix of the Government's Brief, and the District Public Utility Law relied upon are printed in an Appendix for the convenience of the Court. (*Infra*, pp. 79-91)

SUMMARY OF ARGUMENT.

I.

There is no controversy over Interstate Commerce Commission jurisdiction to regulate interstate services and charges of the Virginia companies. The controversy involves only the Commission's jurisdiction to regulate the local intra-District services and compensation therefor of Capital Transit; and the District Court's decision and judgment was so limited. (*Infra*, pp. 28-29)

A.

The District Court's decision was based upon the proviso to Section 216(e) of the Motor Carrier Act and its finding and conclusion that the service of Capital Transit involved in the Commission's orders was "intrastate transportation" within the meaning of that proviso. Appellant's argument that the Commission's orders apply to interstate transportation between points in the District and Virginia points begs the real question, that is, whether the Commission can with its own orders create its jurisdiction over intra-District transportation of Capital Transit by compelling such transportation to be a part of interstate service. (*Infra*, pp. 29-30)

The proviso to Section 216(e) prohibits the application of the Commission's regulatory power over the compensation of Capital Transit for "intrastate transportation", *i.e.*, transportation within the District. The term "intrastate transportation" includes all transportation between points within a State or the District, and is different from

the legal concept of "intrastate commerce". The geographical conception of "intrastate transportation" is complementary to the geographical basis for the District Commission's statutory authority. (*Infra*, pp. 30-31)

The proviso to Section 216(c) represents a more restricted policy on the part of Congress than its policy with respect to the Commission's jurisdiction over railroad service. It was intended not only to prevent application of the *Shreveport* doctrine (234 U.S. 342) but to exclude Commission jurisdiction over compensation for motor carrier service which is intrastate transportation "for any purpose whatever". It was adopted to preserve and as an aid to State regulation of motor carrier service. The existence of authority in the Commission to regulate intrastate transportation as interstate commerce cannot rest on inference resulting in inevitable conflicts with State regulation. (*Infra*, pp. 31-34)

B.

The Commission's conclusion that the States are without power to regulate charges for interstate transportation is in conflict with the decisions of this Court. But, although the District is included in the definition of "State" in the Motor Carrier Act, it cannot be assumed that authority granted to the District Commission by other Acts of Congress was repealed by implication. Congress' powers to legislate for the District are not limited by the Commerce Clause of the Constitution. (*Infra*, pp. 34-35)

The jurisdiction of the District Commission, under the Congressional Act of March 4, 1913, was made to depend upon physical operation within the District. The geographical basis for the District Commission's jurisdiction is necessary, because of the physical situation of the District, in order that such jurisdiction be effective practically. (*Infra*, p. 35)

Specific sections of the District Public Utility Law show that the practical basis for the division of authority between the District Commission and the Interstate Commerce Com-

mission does not depend upon the legal concepts of interstate or intrastate commerce. The District Commission's statutory authority over the operations of Capital Transit within the District is broad, and specific sections of the District Public Utility Law and the Merger Act of January 14, 1933, rescind jurisdiction of the Interstate Commerce Commission and confirm the jurisdiction of the District Commission over transfer arrangements and streetcar service of Capital Transit. The Commission's orders prescribing transfers between Capital Transit lines within the District are in direct conflict with the authority of the District Commission over such transfer arrangements. The major part of Capital Transit service within the District is conducted by street railway facilities. Nothing in the Interstate Commerce Act grants jurisdiction over street railway service. Section 203(a)(13) of the Motor Carrier Act defines "motor vehicle" so as to exclude street railway service. (*Infra*, pp. 35-38)

The District Commission's Order No. 3209, determining its jurisdiction and regulating the Capital Transit segment of service within the District to persons travelling to or from Virginia via the lines of the Virginia companies, was within its statutory authority. (*Infra*, pp. 38-39)

C.

The decisions of this Court in *United States* v. *Yellow Cab Co.*, 332 U.S. 218, and *United States* v. *Capital Transit Co.*, 325 U.S. 357, support the conclusion of the District Court that the intra-District transportation service of Capital Transit involved in the Commission's orders is too unrelated to interstate commerce to constitute a part of interstate commerce. Analysis of this Court's opinion in the former *Capital Transit* case in the light of the present facts of record as contrasted with the facts relied upon in that case to support Commission jurisdiction, shows that the present facts no longer support such jurisdiction. The discriminatory and monopolistic aspects of the direct Virginia interstate service formerly conducted by Capital

Transit no longer exist as the basis for the Court's conclusions in the prior case. (*Infra*, pp. 39-45)

The reliance by the Commission on the *Baer Bros.* case (233 U.S. 479) illustrates the Commission's failure to recognize the significance of the changes in facts as to Capital Transit operations found by the District Court. The *Baer Bros.* case does not support the Commission orders in this case; and other decisions of this Court show that independent local transportation service is not a part of interstate commerce merely by reason of it being a segment of interstate journeys or shipments. (*Infra*, pp. 45-46)

D.

The Appellants have receded from their extreme position that the decision in the prior *Capital Transit* case is *res judicata* as to the jurisdictional questions involved in the present case. The Government's contention that the merits of such jurisdictional questions are foreclosed by the doctrine of collateral estoppel by the former judgment is itself without merit. The doctrines of *res judicata* and collateral estoppel are inapplicable to the present case where the Commission's orders are not the same, are based upon a new and different record, and present different facts and different controlling legal principles. *Federal Trade Comm.* v. *Raladam Co.*, 316 U.S. 149; *Commissioner* v. *Sunnen*, 333 U.S. 591. (*Infra*, pp. 46-48)

Section 203(b)(8) of the Act recognizes that facts supporting the Commission's jurisdiction at one time may no longer support that jurisdiction at a later time. (*Infra*, p. 48)

E.

All of the present Capital Transit operations involved in the Commission's orders come within the exempting provisions of Section 203(b)(8) of the Act. There is no substantial evidence in the record which supports the Commission's finding, under Section 203(b)(8), that application of the provisions of the Act to Capital Transit local service within

the District is necessary to carry out the national transportation policy. (*Infra*, pp. 49-51)

Appellants and the Commission do not refer or rely upon any substantial evidence in the present record to support the Commission's finding under Section 203(b)(8). Instead they rely upon the former record and the prior decision on this point in the *Capital Transit* case. Analysis of this Court's former opinion in that case shows that none of the major circumstances considered as controlling are supported by evidence in the present record. The evidence in the present record shows affirmatively that the fares involved are not a major factor in connection with any matter involved in the national transportation policy. (*Infra*, pp. 50-54)

II.

A decision that the Commission has jurisdiction over Capital Transit operations does not mean that the Commission's orders are lawful in all respects, thus permitting the final disposition of these cases as suggested by Appellants. (*Infra*, p. 55)

A.

The evidence of record and the findings of the District Court show that the fares and the Capital Transit divisions thereof, fixed by the Commission's orders, are confiscatory and unreasonable in that they do not provide for sufficient revenue to cover the costs of the service properly apportionable thereto. There is no basis for the Government's contention that the question of confiscation could not be decided by the District Court on the record before it. (*Infra*, pp. 56-57)

The evidence of record showing the apportionment of Capital Transit costs to the service rendered by it under the Commission's required joint fares was uncontradicted and was referred to without criticism by the Commission. The use of average costs in making such an apportionment is proper where the costs of serving joint fare passengers are dependent upon the same facts as the costs of serving all

other passengers within the District. In the face of the undisputed evidence of record showing confiscation by the Commission's orders, the Government's contention as to the insufficiency of the pleadings borders on the frivolous. (*Infra*, pp. 57-59)

The Government's arguments in support of its request for dissolution of the interlocutory injunction, including the failure to show *prima facie* evidence of confiscation and irreparable damage, are without merit. If meritorious, such arguments would have been appropriate only in an appeal from the interlocutory order, the time for which has expired. (*Infra*, p. 59)

The Commission's own conclusions in its order of July 7, 1948, demonstrate conclusively that the 13⅓ cent fare prescribed by its Order of June 22, 1945, and the Capital Transit division thereof at 5.83 cents, were and are too low, confiscatory, and in violation of the provisions of Section 216 of the Act. Since Capital Transit's costs of rendering service under the 7 cent division of the 16 cent joint fare exceed the revenues to be derived from that division, the division is too low, confiscatory, and in violation of the Act. The Commission cannot, as the Government suggested, fix fares or divisions for a part of Capital Transit service, producing revenues insufficient to cover the costs of such service, on the theory that the resulting loss can be recovered out of the revenues from other service. (*Infra*, pp. 59-61)

The Commission's conclusion in its order of July 7, 1948, that the Virginia companies' divisions should be increased also demonstrates conclusively that the 16 cent fare is inadequate to cover Capital Transit's costs of service and provide lawful divisions to the Virginia companies. It follows that the fare itself is confiscatory. Since the fares and divisions fixed by both the Commission's orders of June 22, 1945, and July 7, 1948, are too low and confiscatory, they are in violation of the provisions of Section 216 of the Act and the Fifth Amendment to the Constitution. (*Infra*, pp. 61-62)

B.

The compensation Capital Transit receives under the Commission's orders is less than the compensation it receives under the fares prescribed by the District Commission for a like and contemporaneous service. The fares prescribed by the Commission's orders are different from the combinations of fares paid for similar services without any significant differences in transportation characteristics. The orders of the Commission thus result in unlawful discrimination under Section 216(d) of the Act. The compensation prescribed for Capital Transit results in a violation of Sections 43-301, 329, and 902, D. C. Code, 1940, preventing discrimination. (*Infra*, pp. 62-63)

The Government's contentions, that such orders do not result in unlawful discrimination if accomplished by means of joint rates, were held to be without merit in *Interstate Commerce Comm.* v. *Mechling*, 330 U.S. 567. (*Infra*, pp. 63-65)

C.

The Commission's conclusions in its Report of July 7, 1948, with respect to the 16 cent fare, and the Capital Transit divisions of 7 cents and 5.83 cents, are not supported by findings showing any rational basis for such conclusions. There are no findings that the existing compensation of Capital Transit was unjust, unreasonable, inequitable, or discriminatory. Such findings are required to be made upon substantial evidence before the Commission can fix divisions or rates under Sections 216(e) or (f) of the Act. (*Infra*, pp. 65-66)

The fixing of the Capital Transit divisions solely on the basis of the agreed proportion in 1945 is insufficient as a basis for the Commission's order of July 7, 1948. (*Infra*, p. 66)

III.

A.

The basis for the Commission's order of May 9, 1947, rejecting the Capital Transit notice of revocation of its con-

currences in the Virginia companies' tariffs, was its assumption that such action by Capital Transit would result in a conclusive violation of law. The Commission's conclusion that it can substitute a summary rejection order for the orderly statutory procedure of suspension and subsequent hearing on the merits of the changes is contrary to the provisions of Sections 216(g) and 217(c) of the Act. Carriers have retained the power to initiate changes in rates on thirty days' notice, under Section 217(c). Section 216(g) prescribes the procedure of suspension and hearing on the merits for tariff changes the Commission wishes to investigate formally. The Commission is without power to substitute for the procedure required by Section 216(g) its own determinations as to violations of law. *Powell* v. *United States*, 300 U.S. 276. (*Infra*, pp. 67-70)

There were no findings by the Commission which would have supported an order of rejection under Section 217(a) of the Act. The Capital Transit revocation notices complied with the terms of the Commission's tariff regulations. But the authority, under Section 217(a), to reject tariffs for filing is not applicable to a notice of revocation of a concurrence because such a notice is not "a publication stating fares and charges" within the meaning of the Commission's own tariff regulations. (*Infra*, pp. 70-72)

B.

Section 216(f) of the Act does not permit the fixing of divisions retroactively to a date prior to October 6, 1947, the date of the initiation of the Commission's investigation of the reasonableness of the divisions. The Commission mistakenly found that June 22, 1947, was the date of its initiation of such investigation. Its order of July 7, 1948, fixing divisions retroactively to June 22, 1947, is unlawful and void. *United States* v. *Baltimore & O. R. Co.*, 284 U.S. 195; *Brimstone R. & C. Co.* v. *United States*, 276 U.S. 104. The retroactive provisions of such order were made without the findings, as required by Section 216(f), that the existing compensation of Capital Transit prescribed by the District

Commission was unjust, unreasonable, etc. (*Infra*, pp. 72-75)

C.

Both the Commission's orders of July 7, 1948, and May 7, 1947, were effective on their face in less than thirty days from their issuance, in violation of Section 221(b) of the Act. The unlawful effective date of such orders makes them wholly void. *United States* v. *Baltimore & O. R. Co.*, 284 U.S. 195. (*Infra*, p. 75)

IV.

The appeal of the Virginia companies should be dismissed for failure to file the bond required by the Rules. (*Infra*, p. 76)

ARGUMENT.

I.

THE INTERSTATE COMMERCE COMMISSION IS WITHOUT JURISDICTION AND THE DISTRICT COMMISSION HAS JURISDICTION OVER THE CAPITAL TRANSIT SERVICE INVOLVED AND THE COMPENSATION THEREFOR.

There was and is no controversy over jurisdiction of the Interstate Commerce Commission to regulate the interstate services, and the rates and charges therefor, of the Virginia companies between their downtown District of Columbia terminal points and points on their respective lines in Virginia. This case involves solely the regulation of the present service of Capital Transit and its compensation therefor. The final injunction decree of the District Court was specifically so limited. (R. 321-322) Such service involved herein is conducted wholly from one point to another within the District by Capital Transit as an indistinguishable part of its local transportation service rendered to all persons within the District. In rendering its judgment, the Court below was obliged to resolve the conflicting claims

to jurisdiction over such service and compensation by the Interstate Commerce Commission and the District Commission and the conflicting requirements of the respective orders relating thereto. In any consideration of this conflict, it is important to remember that both regulatory agencies derive their authority from Acts of Congress.

A.

The Jurisdictional Limitations of Section 216(e).

Section 216 of the Interstate Commerce Act (49 U. S. C. §316) contains the only statutory provisions in that Act giving the Commission authority to fix rates or compensation for motor carrier transportation service under its jurisdiction. Section 216(e) contains the only provisions granting affirmative authority to prescribe or fix rates or fares. Section 216(e) also contains conditions and limitations on the exercise of that authority including the following significant proviso:

> "* * *: *Provided, however,* that nothing in this part [Part II of the Act] shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any purpose whatever."

From its findings of fact concerning the present operations of Capital Transit (R. 103-104), the District Court concluded that the entire transportation conducted by the Company, involved in the Commission's orders, was "intrastate transportation" within the meaning of the foregoing proviso to Section 216(e). Accordingly, the court decided that, by the terms of the proviso, the Commission had no authority to regulate the compensation of Capital Transit for such service. (R. 104-105). These findings and conclusions do not conflict with anything set forth in the Reports of the Commission. The Commission ignored the application of the proviso to the changed operations of

Capital Transit, although that question was repeatedly urged upon it. (R. 471, 481-483, 507)

The Appellants seek to avoid the limitation on the Commission's authority under the proviso to Section 216(e) by arguing that it is inapplicable. They contend that the Commission's orders on their face apply to the interstate transportation of passengers between points in the District and points in Virginia. (Gov't. Br., p. 21) But underlying factual considerations show that this argument is specious and merely begs the question. The Commission's order of July 7, 1948, does in fact fix the compensation for the service of Capital Transit at 7 cents per trip. (R. 141) There can be no question of the fact that the Capital Transit service rendered for that compensation of 7 cents per ride is conducted wholly from one point to another within the District. (R. 103, 370-372, 693, 856, 1261) The so-called joint rate tickets used under compulsion of the Commission's order do not call for a continuous journey between points in the District and points in Virginia (R. 376-377)

The real question is simply whether the Commission, by its own order, can create a fictional joint service between points in the District and Virginia points via the local transportation lines of Capital Transit and regulate the charges or compensation for that portion of the service within the District as a part of a required joint rate. If the Commission can thus avoid the limitations of Section 216(e) by euphemistically referring to the Capital Transit local service within the District as "interstate transportation within State boundaries" (R. 131), and by assuming that such local service is a part of a coordinated through interstate service when in fact it is not, there are no limits to the power of the Commission to expand the scope of its jurisdiction and thereby usurp the functions of local regulatory authorities. *Cf. United States* v. *Baltimore O. S. W. R. Co.*, 226 U. S. 14.

The proviso to Section 216(e) contains a clear and unambiguous prohibition against the application of the regu-

latory power of the Commission over charges or compensation for "intrastate transportation", *i.e.*, transportation from one point to another within a State. The District of Columbia is included in the definition of "state" for purposes of the Act (Section 203(a)(8); 49 U. S. C. § 303(a)(8)). Thus, if language is to convey meaning, the proviso to Section 216(e) serves to deny the Commission the power to regulate the compensation for transportation wholly within the District, *i.e.*, intra-District transportation.

"Intrastate transportation" is a geographical concept, the scope of which is different than the legal concept of transportation in "intrastate commerce". Intrastate transportation includes all transportation between points entirely within State boundaries without regard to the fine distinctions which frequently must be drawn, under varying circumstances, between parts of the transportation in order to determine which parts are in interstate commerce or in intrastate commerce. As applied to the transportation service of Capital Transit within the District, involved in the Commission's orders, the geographical conception of intrastate transportation is perfectly complementary to the geographical basis for the statutory jurisdiction of the District Commission (see page 35 *infra.*) and is the only practical basis for division of authority between the two Commissions. Thus, a conclusion that the local operations of Capital Transit involved in the Commission's orders are in interstate commerce would not necessarily determine that such operations are not "intrastate transportation" within the meaning of the proviso to Section 216(e).

The proviso to Section 216(e) represents the adoption of a policy by Congress differing widely from that adopted in enacting legislation governing railroad rate regulation by the Commission. The policy implicit in this proviso reflects a determination by Congress that Federal rate regulation of motor carrier transportation between points in the same state or the District is unnecessary for effective rate regulation of motor carrier transportation in interstate

commerce between points in a State and points in another State. Congress specifically limited the concept of "interstate commerce" to the latter kind of transportation by its definition in Section 203(a)(10) of the Act. (49 U. S. C. § 303(a)(10)) Regulation of transportation between points within a State is flatly prohibited "for any purpose whatever", even though both kinds of transportation may be and often are blended and intermingled in actual operation.

It is argued by the Appellants that the sole purpose of the proviso to Section 216(e) is merely to exclude the applicability of the doctrine of *Houston E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342, known as the *Shreveport* case, to regulation under the Motor Carrier Act (Part II Interstate Commerce Act). (Gov't. Br., pp. 10, 20-21; Va. Co. Br., p. 18) The proviso was indeed intended to exclude the application of the *Shreveport* doctrine, but the argument ignores the fact that the proviso by its terms goes much further and excludes Commission regulatory jurisdiction over intrastate transportation "for any purpose whatever".

The statutory provisions of Section 216(e), together with the provisions of Sections 202(b) (49 U. S. C. § 302(b)) and 203(a)(10) show by their unambiguous language that Congress intended to leave rate regulation of transportation from one point to another within a State to traditional State control. That policy was adopted in deference to widespread protests by the States against application of Federal rate regulatory power over motor carrier transportation service between points within a State, which would interfere with the long exercised rate regulatory jurisdiction of the States over such service.[7]

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[7] Although the clear and unambiguous terms of the proviso to Section 216(e) of the Act make reference to its legislative history superfluous, it is significant to note that such history shows that Congress responded to the protests of the States in part by the insertion of this proviso and in part by a refusal to amend the additional restriction against regulation of intrastate commerce by motor carriers contained in Section 202(b) of the Act (49

The Motor Carrier Act was intended as an aid to the States in their regulation of intrastate transportation with the least conflict possible between State and Federal regulation of motor carriers. (S. Rept. No. 482, 74th Congr., 1st Sess., p. 3; H. Rept. No. 1645, 74th Congr., 1st Sess., pp. 3, 4.) The existence of authority in the Commission to regulate intrastate transportation as interstate commerce, with its inevitably resulting conflicts with local regulatory authorities, cannot rest on inference as the Commission sought to do.[8] (R. 131) *Cf. Connecticut L. & P. Co.* v. *Fed-*

U. S. C. § 302(b)). The proviso to Section 216(e) was inserted by the House Committee with the explanation that it was intended as a prohibition of "the extension of Federal regulation in intrastate transportation" as exercised by the Commission under the railroad regulatory provisions of the Act. (H. Rept. No. 1645, 74th Congr., 1st Sess., p. 4).

The Senate Committee, on recommendation of Commissioner Eastman of the Interstate Commerce Commission, had proposed an amendment to the provisions of Section 202(b) as they now exist which would have permitted regulation by the Commission of transportation wholly within a State where it affected interstate commerce. Upon objections by the National Association of Railroad and Utilities Commissioners, representing the States, the Senate adopted Senator Gore's motion to eliminate all of the objectionable amendment. (79 Congr. Rec. 5735-5737). Senator Gore's statement in support of his motion is illuminating in view of the Commission's present contentions. He said:

> "I think the clause ought to be stricken out. I do not believe we ought to bring truck and bus transportation which is entirely within a State, under the jurisdiction of the Interstate Commerce Commission on some sort of remote theory that it might directly or indirectly affect interstate commerce."

The Commission is now contending for a construction of the Act which would give it jurisdiction over the very kind of transportation service which Congress expressly refused to give it.

[8] The Virginia Companies also rely on implications sought to be drawn from Section 206(a) of the Act. (Va. Co. Br., p. 17) But that Section does not by its terms confer jurisdiction on the Commission. The proviso to Section 206(a) relied upon serves only to preserve the authority of the States and does not modify in any way the specific limitations of the proviso to Section 216(e) of the Act.

eral Power Comm., 324 U. S. 515, 532; *City of Yonkers* v. *United States*, 320 U. S. 685, 692; *Federal Trade Comm.* v. *Bunte Bros.*, 312 U. S. 349, 351-353.

B.

The Statutory Authority and Orders of the District Commission.

The District Court's conclusions of law summarize the statutory authority for its conclusion that the regulatory power in respect to the transportation of Capital Transit in controversy lies with the District Commission. (R. 99, 105)

In its Report of May 9, 1947, the Commission entirely ignored the statutory authority of the District Commission although it was duly called to the Commission's attention. (R. 350) In its Report of July 7, 1948, the Commission likewise made no reference to the statutory basis of the District Commission's authority although it again had been presented to the Commission (R. 470, 471, 480-486, 491-492). The Commission was content to conclude that "the States are without power to regulate the charges for interstate transportation." (R. 132) But the decisions of this Court show that the States are not powerless to regulate business conducted within the State merely by reason of the fact that such business may be in or a part of interstate commerce. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm.*, 332 U. S. 507; *Port Richmond Ferry Co.* v. *Bd. of Chosen Freeholders*, 234 U. S. 317.

But even though for purposes of the Motor Carrier Act the District is included within the definition of "State", it cannot thereby be assumed that Congress repealed by implication its grant of statutory authority to the District Commission by other Acts. Congress, in exercising its powers under Clause 17 of Article I, Section 8, of the Constitution, is not denied constitutional power by the Commerce Clause of the Constitution (Article I, Section 8,

Clause 3) to grant to the District Commission authority over all transportation conducted within the District—interstate, intrastate, or a combination of both. *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, —— U. S. ——, 69 S. Ct. 1173, 1176-1177, 1182; *O'Donoghue* v. *United States*, 289 U. S. 516, 538-540; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 434-435; *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 442.

Congress, by Act of March 4, 1913 (37 Stat. 974; Title 43, D. C. Code, 1940 §§ 101-1007), created the District Commission and gave it broad regulatory powers over common carriers operating within the District of Columbia. The jurisdiction of the District Commission under that Act was made to depend solely on the fact of transportation operations within the territorial limits of the District, without regard to whether or not such transportation was a part of a stream of interstate commerce or a part of an interstate journey. The grant of jurisdiction to the District Commission on such a geographical basis was necessary in order to clothe it with ample authority for effective regulation. The geographical location and physical characteristics of the District are such that any jurisdictional grant limited by the constitutional concept of interstate commerce would have been without practical significance and, in effect, a nullity.

Section 43-111, D. C. Code, 1940 (see App. p. 83, *infra*), the applicable section of the District of Columbia Code, by careful inclusion and exclusion, defines the common carriers subject to the District Commission's jurisdiction, in relation to the jurisdiction of the Interstate Commerce Commission. The inclusory part of the definition is broad and shows clearly that Congress was basing the District Commission's jurisdiction on "the conveyance of persons or property within the District". The exclusory part of the definition excludes the District Commission's jurisdiction only over steam railroads and express companies subject to the jurisdiction of the Interstate Commerce Com-

mission, and certain other specified transportation companies engaged in interstate commerce. Nevertheless, the District Commission was given jurisdiction over the operations of certain of such companies "inside the District". Section 43-122, D. C. Code, 1940 (see App. p. 84, *infra*), makes the provisions of the District Public Utility Law applicable to the "transportation of passengers * * * from one point to another within the District of Columbia, and any common carrier performing such service; * * *." This statute describes exactly the transportation service now rendered by Capital Transit which is involved in the orders of the Interstate Commerce Commission. It is argued by the Government, however, that Section 43-122 is inapplicable because it in terms provides for a construction to avoid conflict with the Commerce Clause of the Constitution and the Interstate Commerce Act. But, as we have shown, regulation by the District Commission of the Capital Transit intra-District transportation involved herein does not conflict with the Commerce Clause. Indeed, as we have also shown, the Interstate Commerce Act itself contains limitations preventing any such conflict as a result of such regulation by the District Commission.

The broad scope of the District Commission's regulatory power over the operations of Capital Transit includes authority to fix rates, charges, joint rates, regulations, and practices (Sections 43-411, 43-911, D. C. Code, 1940; see App. pp. 85, 88, *infra*). Under Sections 43-329 and 43-902, D. C. Code, 1940 (see App. pp. 85, 87, *infra*), it is unlawful for Capital Transit to receive from any person, firm, or corporation compensation for its service performed within the District which is less than the compensation prescribed in the tariffs lawfully in force within the District under orders of the District Commission, or less than the compensation the Company receives from any other person for a like and contemporaneous service.

Section 43-207, D. C. Code, 1940 (see App. p. 84, *infra*) specifically transferred to the District Commission and

specifically enjoined the Interstate Commerce Commission from exercising jurisdiction over transfer arrangements between streetcar and bus lines and over streetcar service within the District which it formerly exercised under the Act of May 23, 1908 (35 Stat. 250, ch. 190 §§ 12, 16; Public Law 134, 60th Congr., 1st Sess.). By the Merger Act of January 14, 1933 (47 Stat. 752, Ch. 10, Public Res. No. 47, 72nd Congr.) Congress confirmed the broad regulatory powers of the District Commission over the operations and corporate affairs of Capital Transit. (See Sections 2 and 7, of Unification Agreement and Sections 1 and 8 of Merger Act.) By Section 13 of the Unification Agreement, which formed a part of and was approved in the Merger Act, the District Commission's authority over transfer arrangements between Capital Transit lines was broadened.

Both the Interstate Commerce Commission's orders of June 22, 1945, and July 7, 1948, specifically prescribe transfer arrangements between streetcar and bus lines of Capital Transit (R. 52, 138). It is clear that the regulation of transfer arrangements by the Interstate Commerce Commission's orders is in direct conflict with the statutory authority of the District Commission over such arrangements and constitutes an exercise of authority by the former Commission specifically denied it by Congress.

The major part of Capital Transit's business within the District is carried on by means of its street railway facilities. (R. 100) Nothing in Part I of the Interstate Commerce Act grants the Commission jurisdiction to regulate street railway service. *Omaha & C. B. St. R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324. Section 15(3) of that Act specifically prohibits the establishing by the Commission of "any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways * * * and railroads of a different character." Nor is there anything in Part II of the Act which authorizes Commission regulation of street railway service. Section 203 (a) (13) of that Act (49 U. S. C. § 303

(a) (13)) defines "motor vehicle" as used in such Part II but it specifically excludes streetcars from the operation of the Act by providing that the definition "does not include any vehicle, locomotive, or car operated exclusively on rail or rails, * * * furnishing local passenger transportation similar to street railway service." This Court has recently held that the Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 72. Nevertheless, that is the effect of the Commission's orders prescribing the establishment and maintenance of joint fares applicable to the streetcar service of Capital Transit and the motor carrier service of the Virginia companies.

Acting under its statutory authority from Congress the District Commission has from time to time fixed the fares, charges, compensation and transfer arrangements of Capital Transit. (R. 19-42, 1244-1273) By its Order No. 3209, effective June 22, 1947, the District Commission expressly construed its rate fixing orders to be applicable to the Capital Transit transportation service involved in the orders of the Interstate Commerce Commission herein. (R. 60-63) Order No. 3209 ordered and determined as follows (R. 62-63):

> "Section 1. That the transportation of passengers by Capital Transit Company from one point to another within the District of Columbia is subject to the jurisdiction of this Commission, irrespective of whether or not such passengers may have origins or destinations from or to points without the District of Columbia via the lines of other common carriers of passengers.
>
> "Section 2. That the fares or compensation to be charged, demanded, collected, or received by Capital Transit Company for service rendered or to be rendered by it from one point to another within the District of Columbia to passengers travelling between points

in the District of Columbia and points in Arlington County, Virginia, shall be no greater nor less than 10 cents cash or a weekly pass to be sold at $1.50, as authorized by this Commission."

The District Court concluded that Order No. 3209 was within the District Commission's jurisdiction and statutory authority (R. 105-106), and the Government does not assign this conclusion (No. 10) as in error (R. 325-326).

The District Commission subsequently authorized increases in the fares to 13 cents cash, three tokens for 35 cents, and $1.75 for a weekly pass (R. 1272). On July 20, 1948, the District Commission notified Capital Transit that it must cease and desist from honoring the joint fare tickets, required under the Interstate Commerce Commission's order of July 7, 1948, in order to comply with the District Commission's outstanding orders (R. 144-145).

C.

The Decisions of this Court.

United States v. *Yellow Cab Co.*, 332 U. S. 218, was cited in the Opinion of the District Court below. In that case this Court was called upon to determine whether either of two distinct kinds of taxicab transportation service in the City of Chicago constituted transportation in interstate commerce. With respect to the transportation service under contract as a regular course of business between railroad stations in Chicago, this Court held that such transportation was a part of the stream of interstate commerce. With respect to the familiar kind of taxicab transportation service in every city in the land, including service to and from the same railroad stations, this Court held that such transportation was too unrelated to interstate commerce to constitute a part thereof. On this point the Court said (332 U. S. at pp. 230-231):

"Many persons are said to embark upon interstate journeys from their homes, offices and hotels in Chi-

cago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to homes, offices and hotels in Chicago, many persons are said to complete such trips by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of the Chicago taxicabs. But it is that allegedly interstate part of the business upon which rests the validity of the complaint in this particular.

"We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act."

In discussing the considerations which led it to rule that the usual kind of taxicab service was not a part of interstate commerce, the Court stated that (332 U. S. at pp. 231-232):

"These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental.

"In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office or hotel to travel to the railroad station, from which the journey is continued by train; and such a journey ends when he alights from a conveyance near the home, office or hotel which constitutes his ultimate destination. Indeed, the terminal points of an interstate journey may be traced even further to the moment when the traveler leaves or enters his room or office and descends or ascends the building by elevator.

"But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. Swift & Co. v. United States, 196 U. S. 375, 398, 25 S. Ct. 276, 280, 49 L. Ed. 518; North American Co. v. Securities & Exchange Comm., 327 U. S. 686, 705, 66 S. Ct. 785, 796, 90 L. Ed. 945. And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.' United States v. Capital Transit Co., 325 U. S. 357, 363, 65 S. Ct. 1176, 1179, 89 L. Ed. 1663. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare."

The Court's description of the taxicab transportation service to and from the railroad stations in the *Yellow Cab* case applies with singular aptness to the transportation service now furnished by Capital Transit Company within the District to persons who may make interstate journeys to and from Virginia via the lines of the Virginia carriers and who may use the transportation facilities of

Capital Transit to go to and from the downtown areas in Washington where the lines of the Virginia carriers terminate. All of the material considerations which led this Court to hold that the taxicab service to and from railroad stations in the *Yellow Cab* case was too unrelated to interstate commerce to constitute a part thereof are equally applicable to the present transportation furnished by Capital Transit within the District to and from the downtown terminals of the Virginia companies' lines.

The Commission was of the opinion and the Government now contends (Gov't. Br., p. 18) that the Capital Transit operations involved herein fall within the category of transportation in the stream of interstate commerce; and both the Commission and the Government likened such operations to the transportation by taxicab between interstate railroad stations which was held in the *Yellow Cab* case to be a part of interstate commerce.[9] (R. 130) However, findings No. 17 and 18 by the District Court (R. 103-104, see p. 19, *supra*), which are based upon uncontra-

[9] The Government's argument is curiously inconsistent with its representations to this Court in the *Yellow Cab* case. The brief for the United States in the *Yellow Cab* case (No. 1035, Oct. Term, 1946) illustrates and shows why there is less reason for holding the Capital Transit operations here involved to be a part of interstate commerce than the taxicab service there involved which this Court refused to hold to be a part of interstate commerce. After relying upon and quoting from *United States* v. *Capital Transit Co.*, 325 U. S. 357, 363, the Solicitor General said (p. 58):

> "General transportation by streetcars and buses within the District of Columbia is just as much local as is general transportation by taxicab in Chicago. If the former transportation is interstate as to those using this sytem of transportation as the first or last lap in interstate trips, involving as to the actual interstate movement another carrier and a separate fare, so is the transportation by taxicab of interstate travelers to and from Chicago railroad stations. *Of the two, the latter would seem more clearly interstate commerce since the taxicab is engaged by the traveler himself as a means of beginning or ending his interstate trip whereas interstate passengers on Capital Transit's streetcars and buses form merely a part of the general body of passengers which they carry.*" (Italics ours)

dicted evidence of record and do not conflict with any findings of fact by the Commission, fully support the District Court's conclusion, based on the *Yellow Cab* case, that the intra-District transportation of Capital Transit, involved in the Commission's orders, "is too unrelated to interstate commerce to constitute a part thereof."[10]

United States v. *Capital Transit Co.*, 325 U. S. 357, is relied upon by the Government throughout its argument as creating in some manner at least a collateral estoppel by judgment. But analysis of this Court's decision in that case demonstrates conclusively that, under the present facts, the Interstate Commerce Commission is without jurisdiction to lay down the requirements contained in the orders involved in this case.

At the time of that decision and prior to April 1, 1947, Capital Transit operated two bus lines across the Virginia State line into Arlington County under authority of a certificate from the Commission. As the Opinion of this Court shows, the interstate bus lines formerly operated by Capital Transit were integrated with and operated as a coordinated part of its streetcar and bus lines within the District of Columbia. These integrated interstate and local operations were referred to by the Court in the introductory paragraphs of its opinion (325 U. S. at p. 359), and the Court stated that the intra-company transfer practices of Capital Transit "were the equivalent of establishment by Transit of through interstate routes with joint rates." Again in speaking of the contention of the carriers on the second point decided in that case, this Court referred to these "voluntarily established through routes" (325 U. S. at p. 362), and to the use by Capital Transit of its "streetcars and buses as an integrated unit in carrying out inter-

[10] Appellants contend that the *Yellow Cab* case is inapposite because taxicab service is expressly excluded from the operation of the Interstate Commerce Act. We submit that such a statutory exclusion is irrelevant to application of the principles announced in *Yellow Cab* case with respect to the character of the different kinds of transportation service.

state transportation." (325 U. S. at p. 363). After discussing the "interstate journey" of Virginia workers, the Court again referred to the fact that Capital Transit "itself conducted its own traffic to and from Virginia and District residential points as one continuous journey", and stated that "as carried out by Transit the arrangements were the exact equivalent of transportation on a 'through route' for a joint fare." (325 U. S. at p. 364)

This Court held that, under the then existing circumstances referred to above, the Commission had jurisdiction over Capital Transit service to prescribe fares for joint service between Capital Transit and the Virginia carriers. It so held on the stated basis that the Motor Carrier Act "need not be interpreted so as to permit the accomplishment of such a result" of establishing through routes "to the exclusion of its competitors." (325 U. S. at p. 364) The Government now contends that all of such circumstances relied upon in this Court's Opinion are "immaterial and irrelevant" (R. 150).

Appellants rely principally upon the language of the Court at page 363 of 325 U. S. But the language referred to cannot be considered out of its context. That context clearly shows that the basis for the Court's approval of the Commission's order with respect to joint rates was the existence of the discriminatory effect tending toward monopoly produced by the competitive operation of the then existing Capital Transit lines operating into Virginia. The citation by the Court of the cases of *Virginian Ry.* v. *United States*, 272 U. S. 658, 666-667; and *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139-140; emphasize the discriminatory aspects of the then existing facts of Capital Transit's operations. The citation by the Court of the case of *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 617, emphasizes their monopoly aspects. But the fact that today Capital Transit operates no interstate Virginia bus lines integrated with its transit system in the District eliminates the basis for the Court's former conclu-

sions. This is illustrated by the case of *Texas & P. Ry. Co.* v. *United States*, 289 U. S. 627, 646-655. That case distinguishes both the *Virginian* and the *St. Louis* cases, and illustrates why the existing facts of operations cannot cause the discriminatory effect formerly relied upon in support of the Commission's jurisdiction.

The failure of the Commission to recognize the significance of the facts found by the District Court with respect to the present operations of Capital Transit is illustrated by the Commission's reliance on *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. Co.*, 233 U. S. 479, and other decisions of its own (R. 129-130). That case involved the Commission's jurisdiction to regulate railroad freight transportation under Part I of the Interstate Commerce Act. As we have shown, Congress has adopted a much more restricted policy in granting rate regulatory powers to the Commission over motor carriers under Part II of the Act. But the basis of the decision in the *Baer Bros.* case was stated by the Court to have been "a common arrangement between the two carriers" as shown "by the long-continued course in dealing, and the division of the freight, with the knowledge that it had been paid as compensation for the single haul". (233 U. S. at p. 491) Except for the joint rate tickets required by the Commission's orders, the requirement of which is in question here, the facts of the present case clearly show that there is no common arrangement between Capital Transit and either of the Virginia companies. Nor was there any long continued course of dealing between them or any division of a through charge under a single contract for through service between District points and Virginia points. The District Court found that Capital Transit did not voluntarily engage in the joint transportation of passengers with either of the Virginia Companies between points in the District and Virginia points. (R. 104, 171-172) The *Baer Bros.* case does not support the Commission's action of arbitrarily compelling through service and a joint rate for the

purpose of creating and exercising jurisdiction in the Co mission.

In a number of cases this Court has refused to hold th an intrastate shipment occurring before or after an inte state shipment was a part of interstate commerce if t intrastate shipment was independently contracted for is the case here. *Bracht* v. *San Antonio & A. P. Ry. Co.*, 2 U. S. 489; *Chicago M. & St. P. R. Co.* v. *Iowa*, 233 U. 334; *Gulf C. & S. F. R. Co.* v. *Texas*, 204 U. S. 403. Mor over, the *Yellow Cab* case shows that the common accepted limits of an individual's interstate journey cann readily be tested by the different practical considerations which mark the beginning and end of the movement goods and chattels in interstate commerce. (332 U. S. p. 231) The intentions or mental purposes of individua to make or continue on an interstate journey cannot chan the character of the local service rendered by Capit Transit within the District to interstate service. *New Yo Central R. Co.* v. *Mohney*, 252 U. S. 152, 157; *Southern Pa Co.* v. *Arizona*, 249 U. S. 472; *Pennsylvania R. Co.* *Knight*, 192 U. S. 21. Indeed, the District Commission w held to have jurisdiction to regulate the charges of taxic service to and from the Washington railroad stations whe the persons transported had known intentions of beginni or ending interstate journeys. *Terminal Taxicab Co.* *Kutz*, 241 U. S. 252.

D.

The Doctrine of Res Judicata or Collateral Estoppel by Judgment is Inapplicable.

Appellants heretofore have contended, as the Commi sion did in its Reports, that the decision in *United States Capital Transit Co., supra*, makes the question of the Co mission's jurisdiction *res judicata* in this case. They co cede that the questions of confiscation and reasonablene of the fares and divisions can never be regarded as *r*

judicata. (Govt. Statement as to Jurisdiction, p. 6) See *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 371; *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, 418. The Government apparently has receded from its extreme position and now, for the first time, argues that collateral estoppel by judgment is involved (Gov't. Br., p. 16). In so arguing the Government seeks to avoid a decision on the merits of the controversy under the present facts. But the Commission's Order of July 7, 1948, was based upon a new and different record from that considered in the former case. That order superseded the Commission's Order of June 22, 1945. In apparent recognition of these facts, Appellants did not rely upon the doctrine of *res judicata* as applicable to the order of July 7, 1948, or the order of May 9, 1947, in their assignments of error[11] (R. 325, 341).

We have shown that on the basis of the opinion of the Court in the former case the present facts of Capital Transit's operations as found by the District Court make inapplicable the decision in that case on the jurisdictional question. Likewise, the changes in the controlling circumstances relied upon by the Court in determining the jurisdictional question in the former case make inapplicable the doctrine of collateral estoppel by judgment. *Commissioner* v. *Sunnen*, 333 U. S. 591, 597-598, 601-602.[12]

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[11] The insistence by the Virginia companies that the former decision is controlling, because of no material change in the facts, is surprising and wholly inconsistent with their position directly to the contrary before the Commission (R. 391, 423, 424-425, 443, 449-450, 539, 547-548, 557, 570, 1199, 1204-1205).

[12] The Government insists that the effect of the proviso to Section 216 (e), as contended for herein, was argued by Capital Transit in the former case and decided adversely by the Court. (Gov't. Br., p. 16, note 7) But inspection of the second point in the Appellees' Brief in the former case (p. 43 *et seq.*) shows that the contention with respect to Section 216 (e) was limited to its effect on the jurisdiction of the Commission to prescribe the fare for the then existing direct service of Capital Transit to the Pentagon Building, and did not embrace the present contentions with respect to the effect of that Section on jurisdiction over the present local service of Capital Transit within the District as a segment of journeys to or from Virginia points.

The prior decision of the Court on the question of statutory jurisdiction of the Interstate Commerce Commission necessarily rested upon the facts and circumstances of operations supporting the Commission's findings which brought such operations within the ambit of the statutory power conferred upon the Commission. The facts of the operations which determine the question of statutory power are continually changing. Hence, the doctrine of *res judicata* or estoppel by judgment has no application where, as here, the prior decision was based upon different administrative proceedings presenting a different set of events, a different record, and different controlling legal principles.[13] *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149; *Commissioner* v. *Sunnen, supra*, 333 U. S. at p. 601-602.

Moreover, Section 203(b)(8) of the Interstate Commerce Act (49 U. S. C. § 303(b)(8)), which was the subject of the first question decided in the former case, by its terms recognizes that the facts supporting jurisdiction of the Commission under that Section change from time to time. It specifically provides that "the Commission shall from time to time find" that application of the Act is necessary under certain specified circumstances. (See p. 49, *infra*.) This means that operations which were subject to the Commission's jurisdiction, based upon the findings required by that Section when made, subsequently may not be subject to that jurisdiction when the facts no longer support the required findings.

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[13] In one of its earlier opinions in this very case the Commission itself demonstrated why the doctrines of *res judicata* or estoppel by judgment have no application here. *Passenger Fares Between District of Columbia and Nearby Virginia*, 258 I. C. C. 559.

E.

Lack of Evidence to Support Application of the Act Under Section 203 (b) (8).

Unless this Court concludes, first, that the transportation of Capital Transit involved in the Commission's orders constitutes a part of interstate commerce and, second, that such transportation is not "intrastate transportation" within the meaning of the proviso to Section 216(e) of the Act, there is no need to consider the provisions of Section 203(b)(8) of the Act.

Under Section 203(b)(8) all of the provisions of Part II of the Act, with an exception not material here, are made inapplicable to local transportation in interstate commerce under specified conditions. So far as pertinent, Section 203(b)(8) provides as follows:

> " * * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part [Part II], * * * apply to: (8) The transportation of passengers * * * in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage * * * to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; * * * ".

All of the operations of Capital Transit involved in the Commission's orders are within the municipality known as Washington, D. C. (R. 103, 370-372, 693, 856, 1261) All of

the operations of the Virginia companies under the joint fares prescribed by the Commission are within the Washington, D. C. Commercial Zone, as defined by the Commission (R. 642; *Washington, D. C. Commercial Zone*, 3 MCC 243, 48 MCC 460). There is no evidence of record nor any contention by the Appellants that any of the transportation involved is under a common control, management, or arrangement for a continuous carriage to or from a point outside of such Commercial Zone. In fact, the evidence is to the contrary. (R. 618-619) Capital Transit is lawfully engaged in the intrastate transportation of passengers over the entire length of all of its routes.[14] (R. 104, 371, 862)

The Commission concluded, however, that "continued regulation of all fares in issue is necessary in order to carry out the national transportation policy."[15] (R. 132-133) Its Report shows that this conclusion was based primarily on its view that the necessity for the regulation of such fares in the interest of national defense was determined by this Court in the former case, and that the evidence in the reopened record "was along the same lines as the evidence presented by the Departments [War and Navy] at the prior hearings." (R. 131-132) The Government's contentions are similar. (Gov't. Br., p. 23) We

[14] The Virginia companies contend that the exemption provided by Section 203 (b) (8) is inapplicable to the operations of Capital Transit because it is not lawfully engaged in the intrastate transportation of passengers in Virginia, where it presently renders no transportation service whatever. (Va. Co. Br., p. 13) But the language of Section 203 (b) (8) relied on by the Virginia companies does not require intrastate authority over the entire length of interstate routes over which the motor carrier involved does not engage in transportation. Such language only requires that the carrier be lawfully engaged in intrastate transportation over the entire length of its route over which it does in fact engage in transportation.

[15] The "national transportation policy" referred to in Section 203 (b) (8) is found in 54 Stat. 899 (49 U. S. C., note preceding Section 301), and is printed in the Appendix to the Government's Brief (p. 44).

have shown, however, that under the terms of Section 203(b)(8) the decision in the former case cannot be *res judicata* or operate as a collateral estoppel preventing a challenge of the validity of the Commission's present conclusion as to the necessity for the application of the Act under this section. Despite the holding of this Court in the prior case, it must be shown that substantial evidence appears in the record in the present proceedings to support the Commission's conclusion that the application of the Act is necessary in the interests of national defense. We submit there was no such evidence. Neither the Commission's Report nor the briefs of the Appellants refer to any probative evidence sufficient to support the Commission's present conclusion. Appellants rely principally, in support of the Commission's present conclusion, upon the Commission's former conclusion based on the former record.

On this question, this Court said in *United States* v. *Capital Transit Co., supra*, 325 U. S. at pp. 361-362:

> "On its second hearing the Commission heard evidence *from employees of the Army and Navy as to dissatisfaction with the fares.* The Secretaries of both War and Navy made complaints concerning the situation produced by the rate structure. *A number of witnesses testified as to the dissatisfaction of employees with the prevailing rates.* If evidence was necessary to prove that unreasonably high rates were calculated to disturb the morale of workers forced to pay them, and thus *to impair the national defense program*, there can be no doubt but that the findings of the Commission were well supported. It is to be remembered that these were interstate rates for interstate travel *which applied almost exclusively to workers engaged in national defense.* Neither the District nor Virginia had power adequately to regulate the rates; nor had they attempted to do so. Their regulation was rightfully a matter of concern to *Army and Navy Departments charged with the serious responsibility of conducting a war. The employees worked in the very center of activities essential to that cause.* Congress un-

equivocally reserved to the Commission power to regulate reasonableness of interstate rates in the light of the needs of national defense. The findings of the Commission on this issue were clear and complete; cf. *City of Yonkers* v. *United States*, 320 U. S. 685, and justified the Commission in exercising its jurisdiction." (Italics ours)

The factors listed above in this Court's opinion in the prior case as furnishing support for the Commission's conclusion cannot be found in the record in the instant case.

The Commission refers to and the Government relies on the testimony of Mr. Onthank, the director of civilian personnel of the Army, as reaffirming the evidence presented by the Departments at the prior hearings. (R. 132) No employees using the service testified at the reopened hearings; and Mr. Onthank not only did not confirm the earlier evidence but refuted it by testifying that fares were not a major factor in employee recruitment by the Army and that more important reasons caused the Army to lose employees.[18] (R. 838-839) Today the National Military Establishment, and the Navy, Army, and Air Force under it, are no longer "charged with the serious responsibility of conducting a war." The Virginia employees of the Navy, Army and Air Force no longer can be said to be working "in the very center of activities essential to that cause." The President has proclaimed the cessation of hostilities. (R. 862) The Congress of the United States has terminated

[18] Testifying on the subject of the effect of fares on employment by the Army, Mr. Onthank said (R. 839):

"* * *; *most people leave the Army Department for reasons of much greater importance.* For example, a girl is going to get married; reasons of childbirth; a new position back home; reductions in force. Those are the major reasons why people leave. Those are the reasons that are given to us. Now, you will remember what I said was that this matter of fares is one amongst several factors. *I did not say and I don't intend to have it understood that I say that is the major factor or the only factor*, but it is a factor in our ability to recruit in the same labor market with the District of Columbia." (Italics ours)

ertain emergency legislation growing out of the war. (Joint Resolution of July 25, 1947, Public Law 239, ch. 372; Senate Rept. No. 339, June 23, 1947, 80th Cong., 1st Sess.) Neither the Secretary of Defense, who is now the principal assistant to the President in matters relating to the national security, nor the Secretary of the Navy were represented at the reopened hearings before the Commission. (R. 608-609, 840) Neither Secretary has indicated any dissatisfaction with the fare structure which would result from the vacation of the Commission's orders involved herein.

Additional factors listed in this Court's opinion in the prior case, as quoted above, likewise find no support in the present record. So far as Capital Transit is concerned, the compensation it receives is not for interstate travel. Furthermore, we have shown that the District Commission not only has ample authority to regulate such compensation but has actively done so. No one questions the authority of the Interstate Commerce Commission to regulate the reasonableness of the interstate rates of the Virginia companies for their interstate service. If both commissions establish reasonable fares within the scope of their respective jurisdictions, there is no rational basis for any argument supporting the necessity of establishing a single rate for the entire journey by a single rate-making authority. Moreover, the joint fares are no longer applied almost exclusively to employees of the National Military Establishment. They are now available and used by numbers of persons in private residence at certain points in Arlington County for private transportation into District places of employment. (R. 637-638; Exh. 112, R. 900)

The insignificant effect of the present fares upon the morale of government workers travelling between points in the District and points in Virginia is shown by the fact that, although the 13½ cent joint fare (interline ticket) was available to all, only 24% actually used it and that the balance voluntarily paid combinations of other and, in part, higher fares. (Exh. 112, R. 900) The Commission itself

found that over half of such employees working at certain points voluntarily paid other fares (R. 137).

The Commission ignored these significant changes in the circumstances which have taken place since the former decision of this Court. Instead the Commission said "it need only be pointed out that the national transportation policy contemplates a national transportation system that will, among other things, meet the needs of national defense, and it applies in peacetime as well as in wartime." (R. 132) But if authority of the Commission, upheld essentially on the basis of the then existing hostilities of the war, "can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well." *Woods* v. *Cloyd W. Miller Co.*, 333 U. S. 138, 144. If the basis for the Commission's authority for application of the provisions of the Act under Section 203(b)(8) is as broad and nebulous as the Commission implies, there would be grave doubts as to the constitutionality of that section as a delegation of legislative authority to the Commission without adequate statutory standards.

We submit that there is no evidence to support the Commission's conclusion under Section 203(b)(8) that application of Part II of the Act is necessary in order to carry out the national transportation policy "to the end of developing, coordinating, and preserving a national transportation system * * * adequate to meet the needs * * * of the national defense."[17]

[17] Moreover, unless the operations of Capital Transit within the District are exempt from application of the provisions of Part II of the Act the provisions of Section 206 (49 U. S. C. § 306), along with other provisions of Part II of the Act, would be applicable. In such event Capital Transit would be prohibited by Section 206 (a) from engaging in any interstate operation, subject to the Commission's jurisdiction under the Act, without a certificate of convenience and necessity from the Commission. Its former authority from the Commission to engage in interstate transportation

II.

THE COMMISSION'S ORDERS REQUIRE FARES AND DIVISIONS THEREOF WHICH ARE CONFISCATORY, UNJUST, UNREASONABLE, INEQUITABLE, AND DISCRIMINATORY; AND WHICH ARE WITHOUT SUPPORT BY FINDINGS OR EVIDENCE.

Even if it is assumed *arguendo* that the Interstate Commerce Commission has jurisdiction over the operations and compensation of Capital Transit invoived in the Commission's orders, it does not follow, as contended by Appellants (R. 325, 341; Gov't. Br., pp. 28, 33-35), that the District Court erred in failing to hold the Commission's orders valid and lawful in all respects and in enjoining the operation of such orders. In view of the uncontradicted evidence of record showing that costs of the service involved in the Commission's orders exceed the revenues received thereunder (see pp. 11-13, *supra*), the finding of the District Court in that respect (R. 172), the Commission's own findings on the subject (R. 133-138), and the evidence and findings of the District Commission as to the discriminatory effect of the Interstate Commerce Commissions' Orders (R. 61-62, 1261-1262), we contend that those orders violate the Fifth Amendment, the provisions of Section 216 of the Interstate Commerce Act, and certain provisions of the District Public Utility Law. This consideration was not reached by the District Court on the final hearing. However, it did serve as one of the bases for the lower Court's interlocutory injunction. (R. 172.)

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to and from Virginia points expired on March 31, 1947 (R. 127) and the Company was not willing to apply for further authority from the Commission (R. 396, 400). In the absence of a showing of willingness to perform interstate service the Commission cannot grant a certificate, under the provisions of Section 207 (a) of the Act (49 U. S. C. § 307 (a)). *United States* v. *Resler*, 313 U. S. 57, 60-61.

A.

Violation of the Fifth Amendment and Section 216 of the Interstate Commerce Act.

It is contended by the Government that the question of confiscation was not properly before the District Court because not raised and no evidence thereof had been presented before the Commission. The argument is in error both as to the fact and as to the law. The record shows that the question of confiscation was raised before the Commission in connection with any action by the Commission fixing the compensation of Capital Transit at less than the cost apportioned to the service attempted to be regulated plus a reasonable return, as shown by the evidence (R. 471-472, 492-494). The Company could not foresee precisely what divisions and fares would be fixed and prescribed by the Commission's order of July 7, 1948; and there is nothing in the Interstate Commerce Act which requires application to the Commission for reconsideration of prescribed confiscatory compensation prior to bringing action in the courts to have the order set aside or enjoined. *Baltimore & O. R .Co.* v. *United States*, 298 U.S. 349, 370-371. Nothing in *New York* v. *United States*, 331 U. S. 284, 334-335, relied upon by the Government (Gov't. Br., p. 32), changes this rule. The Commission refused to permit detailed evidence of confiscation in its Docket No. MC-C-891.

Contrary to the argument of the Government (Gov't. Br., p. 30-33), Capital Transit did in fact present evidence before the Commission in Docket No. 28991 on the subject of confiscation. That evidence, referred to and not contradicted by the Commission (R. 137), showed that the actual cost attributable to the Capital Transit segement of the transportation service with which the Commission was concerned was no less than 9.968 cents per passenger, without inclusion of the cost of return on the investment in prop-

erty.[18] (R. 856-857; Exh. 135, R. 934) Prescription of fares, divisions, or compensation of any lesser amount per passenger is confiscation. The prescribed divisions of 5.83 cents per passenger from June 22, 1947, to August 2, 1948, and 7 cents per passenger thereafter are both obviously insufficient to cover a cost of over 9 cents per passenger.

Although the Commission advanced no criticism of the foregoing evidence (R. 137), and although the District Court relied upon it as uncontradicted evidence (R. 172), the Government now contends that such evidence is insufficient because the costs attributable to the Capital Transit service with which the Commission was concerned were based upon average costs. (Gov't. Br., p. 30-31.) But the Capital Transit service with which the Commission was concerned was an integrated part of the local transportation service of Capital Transit within the District. Such service involved in the Commission orders is identical with and indistinguishable from the service furnished to all other persons within the District. (R. 103-104, 859, 1261.) The determination of the costs attributable to any service which is a part of the integrated services necessarily requires an apportionment of expenses incurred jointly in the furnishing of the integrated services. The use of average costs under such circumstances has never been condemned by this Court. The cases cited by the Government (Gov't. Br. p. 31) show only that if costs of a particular service are not

[18] There was obviously no concession by counsel that no evidence or insufficient evidence bearing on the question of confiscation was introduced before the Commission. The reference to the offer of proof in the District Court (Gov't. Br., p. 32, note 19) shows that it was proposed to supplement the evidence before the Commission to show the precise effect of the 5.83 cent division applied to the joint rate passengers carried during the period from June 22, 1947 to August 2, 1948. (R. 267) This is the period over which the 5.83 cent division was fixed retroactively and prospectively by the Commission's order of July 7, 1948. (R. 141) It was never intended to imply that the evidence of confiscation before the Commission was insufficient or "not adequately canvassed before the Commission". (See Gov't. Br. p. 33). This was made clear by the statements of Company counsel at the hearing on motion for an interlocutory injunction. (R. 202-208)

dependent on the same facts as the costs of the total business, evidence of one will not be proof of the other. This is not the case here.

In this proceeding, it was shown by undisputed testimony that the average Capital Transit costs of rendering service under the joint fares was identical with the average costs of rendering local service within the District because dependent upon the same facts and cost factors. (R. 859, 873, 879.) The use of average costs under such circumstances reflects the fact that the costs of rendering service under both the joint fares and as a whole within the District are dependent upon the same facts as to service and facilities.[19] If there is any complicated problem of transportation economics involved in the allocation or apportionment of the Capital Transit costs of service to the service with which the Commission was concerned, the record shows that the District Commission resolved those problems by its findings. (R. 1261.) The District Commission has far more intimate knowledge of the cost accounting problems of Capital Transit and of its operations within the District than the Interstate Commerce Commission, which is relatively uninitiated in the problems of local transit costs.

A further contention of the Government with respect to the issue of confiscation appears to border on the frivolous. In the face of the undisputed evidence of record of confisca-

[19] The Government argues that the number of revenue passengers used in arriving at the average costs were based in part upon a "guess." (Gov't. Br., p. 30, note 18) But the record references cited do not support the Government's assertion (R. 871-875). The record shows that the 16 rides per pass used in computing pass revenue passengers, as distinguished from pass transfer passengers, was the most accurate way of determining the cost data per passenger. (R. 874, 875-876) References in such record to a higher pass revenue used were denied as being invalid. (R. 873, 874-875) The 16 revenue rides per pass were confirmed by the data obtained by the Army showing an average total pass use of 17.3 rides per pass (Exh. 152, R. 1001, 1161, including both revenue and transfer use of the pass (R. 1031). The figure of 27.3 rides per pass appearing in the Commission's Report (R. 137) is, doubtless, an obvious typographical error. If this figure was intentionally stated, there is no evidence to support it.

tion, the Government now raises a technical question of pleading. (Gov't. Br. pp. 28-30.) At the most, this argument amounts to a contention that the Company failed to plead evidence. The complaints in this case, however, set forth "a short and plain statement of the claim" as to confiscation, within the meaning of Rule 8 of the Federal Rules of Civil Procedure. (Paragraphs VI, XII, XIV, XV, XVI, XX. R. 3, 7-8, 9; Paragraph XII(f) R. 115-116.) The allegations so made were supplemented, under Rule 65(b) of the Federal Rules of Civil Procedure, by the filing of an affidavit at the hearing on the interlocutory injunction specifying the latest evidence available showing confiscation. (R. 158, 206-208.)

The Government's argument in support of its request for dissolution of the interlocutory injunction is likewise without foundation. In apparent recognition that its contentions in this Court would not support a final determination of the validity of the Commission's orders on the merits as to confiscation and as to other points which Appellees raise, the Government does not suggest that the complaints be dismissed. Instead, it is suggested, in the event of reversal on the jurisdictional question decided below, that this Court should direct the dissolution of the outstanding interlocutory injunction. (Gov't. Br. pp. 28, 34, 35.) In support of this requested disposition, it is argued and implied that there was insufficient evidence of record to support the District Court's finding of *prima facie* evidence of confiscation and irreparable damage, and that the interlocutory injunction was inequitable in its terms. (Gov't. Br. p. 34.) Such an argument has no merit as we have shown, but, if meritorious, it would have been appropriate only in an appeal from the District Court's interlocutory order. The time limit for such an appeal has long expired under Sections 2101(b) and 1253 of Title 28, U. S. Code. We submit that the findings of the District Court, based upon the record evidence of confiscation, fully support its interlocutory decree, and, without more, would likewise support its final decree.

So far as the 13⅓ cent fare prescribed by the Commission's order of June 22, 1945, and the Capital Transit division thereof at 5.83 cents are concerned, the Commission's own Report and Order of July 7, 1948, determined that such fare was insufficient and permitted increases in both the fare and its division. By its own action, therefore, the Commission demonstrates conclusively that the lower fare and division were unjustly and unreasonably low within the meaning of, and in violation of, Sections 216(f), (d), (e), (f) and (i) of the Act. Accordingly, it is only necessary to consider further the unlawfulness of the 16 cent fare and the 7 cent Capital Transit division thereof prescribed by the Commission's order of July 7, 1948. The argument with respect to the invalidity of this fare and division is not avoided by reliance on the fact that such fare and division represent increases over the unreasonably low and confiscatory 13-1/3 cent fare and the 5.83 cent Capital Transit divison. Increased fares and divisions must not be unjust, unreasonable, too low, or confiscatory.

Since the Capital Transit costs, justly apportionable to the rendering of the service under the joint fare required by the Commission, far exceed the compensation of 7 cents prescribed for such service, it follows that Congress is without power, directly or through the Commission, to require Capital Transit to serve the public for such compensation. Compensation which is "not sufficient to cover operating expenses and taxes justly apportionable to the traffic plus an amount reasonably sufficient in the circumstances to constitute just compensation for the use of the carrers' property devoted to that service" is confiscatory. *Baltimore & O. R. Co.* v. *United States*, *supra*, 298 U. S. at pp. 356-358.

The Government contended below that there is no confiscation unless the loss would be so great that the Company "would be required to suspend service and go out of business and be unable to perform its public service." It was further argued that the loss involved herein "could

be compensated for by increased rates on this or other traffic at some other time." (R. 211) But the evidence shows that the Company's earnings as a whole were insufficient to pay the interest on its outstanding debt (R. 853-855, 1169, 1183-1184). It does not aid the argument of the Government in this case to urge that the District Commission "may permit the carrier to make good its loss by charges for other transportation." *Northern Pac. R. Co.* v. *North Dakota*, 236 U.S. 585, 595, 598. For when the Commission undertakes to regulate the compensation of a utility for only that part of its business over which it claims jurisdiction, such compensation must cover the total costs justly apportionable to such service to avoid conflicts between the Commission and other regulatory agencies. *Colorado Interstate Gas Co.* v. *Federal Power Comm.*, 324 U.S. 581, 588; *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 148-149; *Chicago M. & St. P. Ry. Co* v. *Public Utilities Comm.*, 274 U.S. 344.

The conclusion of the Commission that the Virginia companies' division of the joint fare should be increased from 7.5 cents to 9 cents (R. 140, 141) also demonstrates conclusively that the 16 cent fare is inadequate to yield Capital Transit its proper cost plus a reasonable return (11.664 cents; Exh. 135, R. 934) and at the same time yield the Virginia companies such reasonable divisions as will cover their costs. It follows that the fare itself is confiscatory.

Since the 7 cents Capital Transit division and 16 cent fare are confiscatory, it follows *a fortiori*, from the same evidence referred to above, that both the lower 5.83 cent Capital Transit division and the lower 13-1/3 cent fare, fixed retroactively to June 22, 1947 are also confiscatory. And being confiscatory, both the divisions and fares fixed by the Commission's orders deprive Capital Transit of its property without due process of law under the Fifth Amendment to the Constitution.

Divisions which are too low and confiscatory cannot be just, reasonable, and equitable under Sections 216(c) and

216(f) of the Interstate Commerce Act. Likewise, fares which are too low and confiscatory cannot be just and reasonable under Section 216(d) of the Act, and thus are unlawful under its provisions. In this connection, it should be borne in mind that the framers of that legislation thought that costs would be the primary consideration in fixing rates when they said: "Rate regulation under the bill is based primarily on the cost of operation." (H. R. Rept. No. 1645, p. 4; 74th Congr., 1st Sess.)

Since the fares prescribed by the Commission's orders are unlawful, under Section 216 (d), the orders are in violation of the provisions of Section 216 (e) under which the Commission purported to act. It also follows that the Commission did not comply with the provisions of Section 216 (i) of the Act.

B.

Discrimination Under Section 216 of the Interstate Commerce Act and Under the District Public Utility Law.

The service furnished passengers by Capital Transit under the joint fare tickets prescribed by the Commission is identical with and indistinguishable from the service furnished to all other persons within the District. (R. 61-62, 103-104, 371, 859, 1261) Nevertheless, the compensation received by Capital Transit for its service furnished under the orders of the Commission is substantially different from and less than the compensation it receives under the fares prescribed by the District Commission for a like and contemporaneous service. Moreover, the joint fares prescribed by the Commission are substantially different from and less than the combinations of fares for similar services from the companies involved without any significant differences in transportation characteristics. (R. 61-62, 137, 1261-1262) The orders of the Commission thus result in preferential treatment for a selected group of Government employees at arbitrarily selected points. Such orders also

result in such preference for certain persons in private residence at Arlington Farms and other points in Virginia. (R. 637-638, 640) These facts make inevitable the conclusion that the joint fares and the divisions ordered by the Commission are, under applicable law, discriminatory and illegal.

Section 216 (d) of the Interstate Commerce Act makes undue, unreasonable, or unjust preferences and discriminations unlawful. Section 216 (e) of the Act requires all fares prescribed by the Commission to be lawful. It follows that discriminatory fares are beyond the Commission's power to prescribe. Likewise, Section 43-301, D. C. Code, 1940, declares discriminatory charges for transportation within the District to be unlawful. Sections 43-329 and 43-902, D. C. Code, 1940, make it unlawful for Capital Transit to receive from any person or corporation compensation for its service within the District which is less than the compensation prescribed in its lawful District tariffs, or less than the compensation it receives from any other person for a like and contemporaneous service. It is obvious that neither the Capital Transit compensation nor the joint fares prescribed by the Commission comply with the foregoing statutes.

When the pertinent facts are viewed in light of these statutory provisions, it is clear, we submit, that the Commission by its order seeks "to shelter a flatly forbidden discrimination behind the shield of expertise" without explanation. (See Black, J. in *Interstate Commerce Comm.* v. *Inland Waterways Corp.*, 319 U.S. 671, 695-696). We submit further that in the instant case the "basic error of the Commission is that it seemed to act on the assumption that the Congressional prohibtion of * * * rate discriminations * * * were not applicable to such discriminations if accomplished by through rates." *Interstate Commerce Comm.* v. *Mechling*, 330 U.S. 567, 577.

In the *Mechling* case the Commission prescribed compensation in the form of "proportional" rates[20] for a leg of a through transportation service. These rates differed for the same service depending on the origin of the shipments on the other leg of the transportation. This Court held that the varying origins of the shipments did not constitute a difference in transportation characterstics sufficient to justify a difference in the compensation prescribed. Accordingly, this Court ruled that the Commission's order was unlawful under the statutes prohibiting discrimination. The same reasoning and result are applicable to the present case. For here, too, the Commission has prescribed compensation for Capital Transit at 5.83 cents and 7 cents for what is assumed by the Commission to be a leg of through service to and from Virginia points. Furthermore, the compensation prescribed is different from that received for the same service rendered by Capital Transit to persons not travelling to and from Virginia, and the difference is made to depend on the different origins or destinations of the passengers on the Virginia leg of the transportation or on merely the choice of fares used. Under the *Mechling* case, such differences cannot be sufficient to give rise to a difference in compensation. In fact, these differences are not differences in transportation characteristics at all.

We do not wish to end this portion of our argument without pointing out that the Government misunderstands and mistakes the basis for our contention that the divisions and fares prescribed by the Commission are discriminatory. Appellants argue that the basis for our contention is that varying compensation has been prescribed for identical distances travelled. (Gov't. Br., p. 26) We have made no such argument. On the contrary, as shown above, the basis for

[20] Proportional rates show the basis of the division of charges between connecting carriers under combination rates for through service. A proportional rate serves precisely the same purpose as a division of a joint rate for through service. *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458, 459-460.

our contention is the identity of the transportation services rendered and facilities furnished by Capital Transit, not the identity of distances travelled. The local transportation service rendered for one fare by Capital Transit within the District consists of the right to travel any distance between two points in the District with unlimited transfer privileges in the same general direction. The service rendered to all persons within the District and the costs thereof are the same regardless of the distance any one or a group of persons actually travels. (R. 873, 879) The uniform rate for service within the District, prescribed by the District Commission, is in recognition of that fact.

C.

Lack of Necessary Findings and Evidence to Support the Fares and Divisions Prescribed by the Commission's Order of July 7, 1948.

Although the Commission made findings in its Report of July 7, 1948, showing that the 13⅓ cent fare and divisions thereof were too low to be just, reasonable and equitable, its conclusion that a 16 cent fare would be reasonable is unexplained by findings or anything in its Report. (R. 138.) There are no findings that either the local fares of Capital Transit within the District or their combination with the fares of the Virginia lines, fixed by the Commission, are unjust or unreasonable. And the only basis used by the Commission in determining the divisions of both the 13⅓ cent fare and the 16 cent fare prescribed by it was the 1945 agreement of the carriers as to the proportion each was to receive of the 13⅓ cent fare. The divisions of the 16 cent fare were arrived at by merely projecting, proportionately, the agreed upon division of the 13⅓ cent fare to the 16 cent fare. No other findings were made in support of the divisions fixed by the Commission. (R. 138-139.) Fares and divisions so established are, we submit, invalid because not supported by adequate findings.

Before the Commission can exercise its authority to fix or prescribe either fares or divisions under Sections 216(e) or 216(f), it must make the findings required by those sections that the existing fares or divisions are unjust, unreasonable, inequitable, or discriminatory. *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 92; *Florida* v. *United States*, 283 U.S. 194, 212, 214-215; *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 459, 464-465; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489. The Commission made no such findings with respect to the 16 cent fare and the divisions thereof, and those which were made are wholly inadequate to support its order. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 504-506; *Colorado-Wyoming Gas Co.* v. *Federal Power Comm.*, 324 U.S. 626, 634; *North Carolina* v. *United States*, 325 U.S. 507, 520.

The original division of the 13⅓ cent fare had no basis or formula to support it (R. 138, 878) and the Capital Transit share was considered by it to be inadequate from the beginning. (R. 878.) The amount of a just, reasonable, and equitable division "is to be determined, not by agreement of the parties, or by mileage. It is to be fixed by the Commission; fixed at what the board finds to be just, reasonable, and equitable. Cost of service is one of the elements of rate making." *New England Divisions Case*, (*Akron, C. & Y. Ry. Co.* v. *United States*), 261 U. S. 184, 195. And "divisions valid when made may later become confiscatory." *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 371.

In the absence of the Commission's orders, the compensation for the Capital Transit service involved would have been its local fares which were and are more than the divisions fixed and prescribed by the Commission. The effect of those orders is to reduce the compensation of Capital Transit under the divisions fixed without findings or evi-

dence as to the costs involved.[21] In the face of the uncontradicted evidence as to the Capital Transit costs incurred in rendering the service involved, the Commission could not lawfully have arrived at the conclusion it did with respect to the Capital Transit divisions. *Brimstone R. & Canal Co.* v. *United States*, 276 U.S. 104, 116.

III.

THE COMMISSION FAILED TO COMPLY WITH OTHER STATUTORY LIMITATIONS AND REQUIREMENTS.

Assuming *arguendo* that the Commission has jurisdiction over the operations of Capital Transit involved in its orders, those orders exceed its statutory authority and are in violation of various provisions of the Interstate Commerce Act in a number of other and independent respects. By their very nature, none of the following points were or could have been raised in the prior litigation and, accordingly, were not included in the former decision by this Court.

A.

The Rejection of the Notice of Revocation Exceeds the Commission's Statutory Authority.

In its Report accompanying its Order of May 9, 1947, rejecting the Capital Transit notice of revocation of concurrences in the Virginia companies' tariffs, the Commission based its rejection action, in lieu of suspension, on its conclusion that the result would be the collection of a combination of fares exceeding and necessarily in violation of the fares for joint service prescribed by its order of June 22, 1945. (R. 52-53.) In so concluding, the Commission refused to consider or allow time for presentation of de-

[21] The amount of the reduction in the revenues of Capital Transit resulting from the application of the 5.83 cent division for the period June 22, 1947, to August 2, 1947, under the Commission's Order of July 7, 1948, was found by the District Commission to be $83,297.00 (R. 1261).

tailed evidence showing the unlawfulness of the fares prescribed by its Order of June 22, 1945. (R. 51, 354-355, 364, 368, 373-376, 380.)

In effect the Commission's basis for the rejection order is its conclusion that once an order of the Commission prescribing fares for joint service is issued, any action by a carrier which would result in the collection of fares other than the prescribed fares is a conclusive violation of law. The Commission concluded that it can summarily reject such action without suspension proceedings or hearing as to the lawfulness of the resulting new fares or the unlawfulness of the existing fares, irrespective of changed economic conditions or changes in facts controlling jurisdiction.[22]

But "neither the original Interstate Commerce Act nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or to reduce them." *Skinner & Eddy Corp* v. *United States*, 249 U.S. 557, 564-565. See also *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 383-384; *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 522; *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 92. Also "There is no presumption of wrong arising from a change of rate by a carrier"; and "the mere fact that a rate has been raised carries with it no presumption that it is not rightfully done." *Interstate Commerce Comm.* v. *Chicago, G. W. R. Co.*, 209 U.S. 108, 119-120

Under Section 217(c) of the Act (49 U.S.C. §317(c)) carriers retain their original power to change their fares, on 30 days' notice, by the filing and posting of an appropriate change in their tariffs. When such a change in tariffs

[22] This position was carried to its ultimate arbitrary conclusion by the Commission in its rejection without notice or other proceedings of the notice of revocation of the concurrences in the Virginia companies' tariffs filed by Capital Transit on July 20, 1948. (R. 143) The validity of this Commission action is the subject of a separate suit in *Capital Transit Co.* v. *United States*, U.S. Dist. Ct. for D.C., No. 4454-48, still pending in the District Court.

is so filed, the Act prescribes the procedure to be followed by the Commission if it determines to question the change. Section 216(g) of the Act allows the Commission to suspend the operation of filed tariff schedules stating a new fare for a specified limited period beyond the time they would otherwise go into effect. But that section also makes it mandatory for the Commission to "enter upon a hearing concerning the lawfulness" of the changed fare, if the Commission decides to suspend the schedule.

In the instant case the Commission did not follow the orderly statutory procedure of suspension, with its limitations in time and its requirement for a hearing concerning the lawfulness of the resulting new fares. It concluded that any change in the existing joint fares were presumed conclusively to be unlawful and in violation of its earlier orders, and thus subject to final action by rejection for filing. The Commission thereby assumes the power of a Court to determine, without a hearing on the merits, whether changes in tariffs or fares are or are not "clearly unlawful" and in violation of its own orders. The Government in its Brief (p. 6, note 4) recedes from the position of the Commission by claiming that the Capital Transit notices only "could have" resulted in fares violating the Order of June 22, 1945.[23]

A similar attempt by the Commission to usurp the judicial power of determining violations of law as a basis for rejecting a filed tariff change was held unlawful by this Court in *Powell* v. *United States*, 300 U.S. 276. In that case the Commission ordered "stricken from the files" a tariff of a carrier on the ground that it was in violation of a provision in the Act similar to Section 217(a) requiring the

[23] In this respect the decision of the Government not to support the basis of the Commission's summary rejection of the revocation notices is clearly correct, because the existence of a through or joint service does not necessarily require the establishment of a joint rate. Other forms of combination rates for the through or joint service required by the Commission's Order of June 22, 1945, would have complied with the terms of that order. *Cf. St. Louis Southwestern R. Co.* v. *United States*, 245 U.S. 136, note 4.

filing of tariff schedules. Before the courts it was contended that the Commission's Order was justified because the tariff involved aided the carrier in violating another Section of the Act. (300 U.S. at pp. 278-280) As in the instant case, the Commission did not attempt to suspend the tariff and determine the lawfulness of the changes contained in it. (300 U.S. at pp. 283-284). This Court held that the Commission's order was illegal and void, that questions of violations of law by filing tariffs were questions which only a court could determine in an appropriate suit, and that the decision of such questions was not the function of the Commission (300 U.S. at p. 287). To the contention advanced by the Government that the Commission rightly ordered the tariff stricken from the files as in violation of the tariff filing provisions of the Act, the Court answered (300 U.S. at p. 288):

> "Plainly that begs the question. It takes for granted a violation of Section 1(18), a fact not established and one which the Commission had no jurisdiction to determine. The contention is fallacious and must be rejected.
>
> * * *
>
> "The governing statutory provisions do not permit substitution of the Commission's order for the decree of a court. * * *"

Likewise, in the instant case, the question of whether the Capital Transit revocation notice would result in violation of any lawful order of the Commission was a question which could only be determined either by suspension proceedings and a hearing on the lawfulness of the resulting fares or by proceedings in a court to enforce or to annul the Commission's order of June 22, 1945. It is not a question which the Commission can conclusively determine as a basis for its summary rejection order.

The only authority of the Commission to reject tariffs is contained in Section 217(a) of the Act which provides in part:

"* * *; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations."

The regulations referred to are the tariff regulations which that section authorizes the Commission to prescribe. The Commission did not find that the Capital Transit revocation notice was "not in consonance with this section and with such regulations". There is no evidence in the record upon which it could have based any such finding.

Rule 15(d), Section 4, of the Commission's Tariff Circular MP No. 3, (49 C.F.R. §186.15(d)), which contains the regulation prescribing the method of cancelling or revoking concurrences reads as follows:

> "Whenever a carrier desires to cancel the authority granted an agent or another carrier by power of attorney or concurrence, this may be done by a letter addressed to the Commission revoking such authority on 60 days notice. Copies of such notice must also be mailed to all interested parties."

There can be no question that each of the Capital Transit notices of revocation dated February 26, 1947, March 6, 1947, and July 20, 1948 (R. 143, 398) complied with this regulation. Moreover, as the District Court found (R. 100), the concurrences revoked by the Capital Transit notices all expressly reserved the right of revocation on appropriate notice (R. 438-440). Such a reservation is proper and, indeed, is contained in the form of concurrence prescribed by the Commission. (Rule 15(b), Section 4 ICC Tariff Circular MP No. 3; 49 C.F.R. §186.15(b))

But even the limited authority to reject "tariffs" for filing under Section 217(a) of the Act is inapplicable as authority to reject a notice of revocation of a concurrence. The Commission itself defines the term "tariff" as meaning "a publication stating fares and charges of a common carrier and all rules which it applies in connection therewith". (Paragraph 2, ICC Tariff Circular MP No. 3; 49 C.F.R. §186.0) A notice of revocation of a concurrence

does not state fares or charges of a carrier and thus does not come within this definition. In addition the Commission in its foregoing regulation concerning revocation of concurrences has recognized the essential difference between revocation notices and tariffs by its prescribed 60 days' notice requirement. Any regulation which requires 60 days' notice of filing of an effective tariff change is contrary to the provisions of Section 217(c) which permits such changes on only 30 days' notice.

We submit, therefore, that the Commission's order of May 9, 1947, was in excess of its statutory authority and is illegal and void.

B.

The Fixing of Divisions Retroactively to June 22, 1947, Exceeds the Commission's Statutory Authority.

By its order of July 7, 1948, the Commission fixed Capital Transit's division of the 13-1/3 cent fare at 5.83 cents retroactive to June 22, 1947. Section 216(f) of the Act (49 U.S.C. 316(f)) permits retroactive adjustment of divisions under specified circumstances. But the period of time over which such retroactive adjustment may be made is carefully limited. Insofar as material to this question Section 216(f) provides as follows:

> "* * * and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the Commission finds justified and, in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as part of the original order."

The Commission had prescribed no divisions "as part of the original order" of June 22, 1945. Under Order No. 3209 of the District Commission, Capital Transit, as of June 22, 1947, was required to and did demand and bill the Virginia Companies 10 cents cash per ride as its compensation under the joint fare ticket. (R. 62, 101-102, 653-654, 932-933, 935-936) The Virginia companies made no application for reconsideration of the District Commission's Order No. 3209 (R. 102). Furthermore, they did not make any complaint to the Interstate Commerce Commission as to divisions in their petitions of August 15, 1947 (R. 440-444, 444-451) and neither company sought a reparation order with respect to the divisions of the joint fare for the period on and after June 22, 1947. (R. 138)

The first notice of any issue as to divisions was contained in the Commission's order of October 6, 1947, reopening its Docket No. 28991. (R. 459-460) In its Report of July 7, 1948, the Commission mistakenly refers to the date of June 22, 1947, instead of October 6, 1947, as "the date of the reopening order". (R. 138-139) Under Section 216(f), therefore, any retroactive adjustment of divisions authorized by that statute should have been limited to a period beginning with the "entry of the order of investigation" as to such divisions on October 6, 1947. On the face of the statute, therefore, the retroactive adjustment of divisions from the earlier date of June 22, 1947, is in excess of the Commission's statutory authority. We submit, therefore, that the part of the Commission's order of July 7, 1948, fixing divisions of the 13-1/3 cent fare retroactively, to June 22, 1947, a date not authorized by Section 216(f), is wholly null and void. *Baltimore & O. R. Co.* v. *United States*, 43 F. 2d. 603, 606, *affirmed, United States* v. *Baltimore & O. R. Co.*, 284 U.S. 195.

In this connection, in the case of *Brimstone R. & Canal Co.* v. *United States*, 276 U.S. 104, 117-123, the Court held void a retroactive division order of the Commission, and in so holding considered at length the history of the power to adjust divisions retroactively. The Court there recog-

nized that retroactive adjustment of divisions was harsh and drastic and it held that the comparable provisions of Part I of the Act strictly limited the power of the Commission to enter retroactive orders, saying (p. 121):

> "Ordinarily divisions of a particular rate are not of public interest, if the rate itself is reasonable. Probably aware of the hardships under the old rule, the new Act shortened the time during which readjustment might be required—limited its beginning to the commencement of investigation or filing of complaint."

In an effort to comply with the orders of both Commissions, Capital Transit continued to accept the joint fare tickets after June 22, 1947, only upon the basis of the District Commission's Order No. 3209, which required it to receive after that date not less than 10 cents cash as its compensation. The retroactive provision of the Interstate Commerce Commission's Order of July 7, 1948, obviously was aimed at nullifying the effect of the District Commission's order, even though the Virginia companies had taken no action to review or otherwise change the effect of the District Commission's order.

The retroactive provision of the Interstate Commerce Commission's Order of July 7, 1948, has the exceedingly harsh and drastic effect of fixing Capital Transit's compensation retroactively to June 22, 1947, at 5.83 cents instead of the 10 cents required from that date by the District Commission's Order No 3209. The retroactive provision thus limits such compensation to an amount far below the cost incurred in the service and even below the 7 cents compensation which the Commission found to be necessary. Moreover, the Commission's retroactive order was made without a finding that the 10 cents compensation of Capital Transit as prescribed by the District Commission's Order No. 3209 was "unjust, unreasonable, or inequitable, or unduly preferential or prejudicial". Such a finding, under the express provisions of Section 216(f), is essential to the validity of any retroactive division order.

For the foregoing reasons we submit that the retroactive provision of the Commission's order of July 7, 1948, is null, void, and unlawful.

C.

Effectiveness of Orders of July 7, 1948, and May 9, 1947, in less than Thirty Days Renders Such Orders Void.

The Commission's Order of July 7, 1948, required Capital Transit to maintain and apply joint fares not exceeding 16 cents, and fixed divisions thereof, effective "on and after August 2, 1948." (R. 141) The Commission's Order of May 9, 1947, rejecting Capital Transit's revocation notice, became effective upon its issuance. (R 55) Thus, both of the orders were effective in less than thirty days from their date of entry. Section 221(b) of the Interstate Commerce Act (49 U.S.C. §321(b)) requires that orders of the Commission shall take effect in "not less than thirty days". The Commission's orders are in violation of this section.

In *United States* v. *Baltimore & O. R. Co.*, 284 U.S. 195, the Court considered the effect of substantially the same statutory language contained in Part I of the Act. The Commission had issued an order on November 5, 1927, fixing divisions retroactively from August 6, 1926. After the decision in *Brimstone R. & Canal Co.* v. *United States*, *supra*, the Commission concluded that its order was void. It then reopened the proceeding and, after further hearing, issued a second order on May 7, 1929, fixing the divisions retroactively from December 5, 1927 (thirty days after the date of entry of the first order). This Court held, however, that, since neither order had fixed a lawful effective date more than thirty days after its entry, both orders were wholly ineffective and invalid.

We submit that the Orders of July 7, 1948, and May 9, 1947, in this case are wholly invalid because no lawful effective date was prescribed therein as required by Section 221(b).

IV.

THE VIRGINIA COMPANIES ARE REQUIRED TO FILE BONDS ON APPEAL.

The Virginia companies, Appellants in No. 41, contend that no bond on appeal is required of them because no statute provides for such a bond. But as we pointed out in our Statement and Motion to Dismiss their appeal, both paragraph 1 of Rule 36 of this Court and Rule 72 of the Federal Rules of Civil Procedure require such bonds on appeal. By Title 28, Section 2072, U.S. Code, this Court was given authority to prescribe rules for the United States District Courts, so that the Federal Rules of Civil Procedure have the binding effect of a statute.

The Virginia companies also argue that a bond is not required in this case because of certain protective provisions of the District Court's interlocutory injunction permitting the recovery of full compensation by Capital Transit pending review. But these provisions do not fully save the Company harmless from loss. To the extent the appeals herein continued those interlocutory provisions, Capital Transit is suffering damage by reason of the additional cost of printing and of the additional time involved in distributing and accounting for refund tickets on all of its lines in the District. Appeal bonds are designed to enable the recovery of such costs and damage as well as the costs of the appeal itself.

We submit that the appeals in No. 41 should be dismissed.

V.

CONCLUSION.

For the foregoing reasons we respectfully submit that the decision, order, and judgment of the District Court

should be affirmed and that the orders of the Interstate Commerce Commission set aside and enjoined by that judgment should be held unlawful and void.

Respectfully submitted,

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October, 1949.

APPENDIX.

Statutes Involved.

(Sections 202(a), 203(a)(10), 203(b)(8), and 216 are printed in the Appendix to the Government's Brief, pp. 36-44.)

Interstate Commerce Act.

Section 15(3) [49 U. S. C. § 15(3)] Establishment of through routes, joint classifications, joint rates, fares, etc.

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this p rt and common carriers by water subject to part III, or the maxima or minima; or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Section 202(b) [49 U. S. C. § 302(b)]. Application of provisions.

Nothing in this part shall be construed to effect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

Section 203 [49 U. S. C. § 303]. Definitions and exceptions —(a) Definitions.

As used in this part—

* * *

(8) The term "State" means any of the several States and the District of Columbia.

* * *

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

Section 206(a) [49 U. S. C. § 306(a)]. Certificate of convenience and necessity—Necessity for; motor carriers in bona fide operation on June 1, 1935.

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehi-

cle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

Section 207(a) [49 U. S. C. § 307(a)] Issuance of certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini.

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and

able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Section 217 [49 U. S. C. § 317]. Tariffs of common carriers by motor vehicle—(a) Filing, posting, and publication.

Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

* * *

(c) Change in tariffs; filing and posting notice; powers of Commission.

No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of

a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

Section 221(b) [49 U. S. C. § 321(b)]. Orders, notices and service of process.

Effective Date and Duration of Orders of Commission.

Except as otherwise provided in this chapter, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

District of Columbia Code, 1940 ed.
Section 43-111. Common carrier—Exempt organizations.

The term "common carrier" when used in chapters 1-10 of this title includes express companies and every corporation, street railroad corporation, company, association, joint-stock company or association, partnership, and person, their lessees, trustees, or receivers, appointed by any court whatsoever, owning, operating, controlling, or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire. Steam railroads, express companies subject to the jurisdiction of the Interstate Commerce Commission, the Washington Terminal Company, and the Norfolk and Washington Steamboat Company, and all companies engaged in interstate traffic upon the Potomac River and Chesapeake Bay and the Washington and Old Dominion Railway, excepting as to the regulation of its operation

inside of the District of Columbia, and the Arlington and Fairfax Railway Company, excepting as to the regulation of its operation inside of the District of Columbia, are excluded from the operation of chapters 1-10 of this title, and are not included in the term "common carrier."

Section 43-122. Chapters 1-10 of this title, applicable to transportation of passengers, freight, or property within the District of Columbia—Construction in connection with Constitution and interstate commerce laws.

Chapters 1-10 of this title shall apply to the transportation of passengers, freight, or property from one point to another within the District of Columbia, and any common carrier performing such service; and chapters 1-10 of this title shall be so applicable and be so construed as to be free from conflict with those provisions of the Constitution of the United States and the laws in pursuance thereof relating to interstate commerce.

Section 43-207. Power withdrawn from Interstate Commission—Rules and regulations of said commission to remain in force.

The authority vested by law in the Interstate Commerce Commission by virtue and under the Act of Congress, approved May 23, 1908, entitled "An Act authorizing certain extensions to be made in the lines of the Anacostia and Potomac River Railroad Company, the Washington Railway and Electric Company, the City and Suburban Railway of Washington, and the Capital Traction Company, in the District of Columbia and for other purposes" (35 Stat. 246, ch. 190), shall no longer be exercised by the Interstate Commerce Commission: *Provided*, That the orders, rules, and regulations made by the Interstate Commerce Commission by virtue of and under the said Act of Congress, approved May 23, 1908, shall continue to be in force until changed, repealed, altered, or amended by the commission created by chapters 1-10 of this title, which said commission is hereby given power and jurisdiction to issue and, at its pleasure to revoke all permits, or licenses, to carry chapters 1-10 of this title into effect, and its rules and regulations shall be

valid and binding on all public-service corporations and on all persons.

Section 43-301. Public utilities—Service and facilities—Charges to be reasonable, just, and nondiscriminatory—To obey orders of commission.

Every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just, and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by chapters 1-10 of this title.

Section 43-329. Utility not to receive greater or less compensation than fixed in schedule.

It shall be unlawful for any public utility to charge, demand, collect, or receive a greater or less compensation for any service performed by it within the District of Columbia, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect, or receive any rate, toll, or charge not specified in such schedules. The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges until the same are changed as provided in chapters 1-10 of this title.

Section 43-411. Reasonable rates may be ordered—Notice to be given utility affected thereby.

If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of chapters 1-10 of this title, the commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, tolls, charges, or schedules as shall be just and reasonable. If upon such investi-

gation it shall be found that any regulation, time schedule, act, or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this section, or if it is to be found that reasonable service is not supplied, the commission shall have power to determine and substitute therefor such other regulations, time schedules, service, or acts and to make such orders respecting and such changes in such regulations, time schedules, service, or acts as shall be just and reasonable. And upon any investigation for the purpose of determining upon and requiring any reasonable extension or extensions of lines or of service that shall promise to be compensatory within a reasonable time, the commission shall have power to fix, determine, and require every such extension or extensions to be made and the terms and conditions upon which the same shall be made: *Provided;* That no hearing shall be had and no order shall be made respecting such extension or extensions, without notice to the public utility affected thereby, as provided in section 43-410.

Section 43-704. Application to District Court for instructions—Application for reconsideration.

If at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of chapters 1-10 of this title, they are authorized and empowered to institute a proceeding in equity in the District Court of the United States for the District of Columbia petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action.

Any public utility or any other person or corporation affected by any final order or decision of the commission may, within thirty days after the publication thereof, file with the commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility or other person or corporation shall in any court urge or rely on any ground not so set forth in said application. The commission, within thirty days after the filing of such application, shall either grant

or deny it. Failure by the commission to act upon such application within such period shall be deemed a denial thereof. If such application be granted, the commission, after giving notice thereof to all interested parties, shall, either with or without hearing, rescind, modify, or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application: *Provided*, That upon written consent of the utility such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined.

Section 43-902. Penalty for demanding or receiving greater or less than established rates.

If any public utility or any agent or officer thereof shall, directly or indirectly, by any device whatsoever, or otherwise, charge, demand, collect, or receive from any person, firm, or corporation a greater or less compensation for any service rendered or to be rendered by it in or affecting or relating to the conduct of a street railroad or street railroad corporation, common carrier, gas plant, gas corporation, electric plant, electric corporation, water power company, telephone line, telephone corporation, telegraph line, or telegraph corporation, or pipe line company, or to the production, transmission, delivery or furnishing of heat, light, water, or power, or the conveyance of telephone or telegraph messages, or for any service in connection therewith than that prescribed in the public schedules or tariffs then in force or established as provided herein, or than it charges, demands, collects, or receives from any other person, firm, or corporation other than one conducting a like business for a like and contemporaneous service, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be a misdemeanor and unlawful, and upon conviction thereof shall forfeit and pay to the District of Columbia not less than $100 nor more than $1,000 for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by

a fine of not less than $50 nor more than $100 for each offense.

Section 43-911. Commission may regulate unreasonable and discriminatory rates and fix new rates.

Whenever, after hearing and investigation as provided in chapters 1-10 of this title, the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in chapters 1-10 of this title.

Merger Act of Jan 14, 1933. [47 Stat. 752; Public Rec. No. 47, 72nd Cong.]

* * *

Unification Agreement.

* * *

Second: The New Company shall be incorporated under the provisions of Subchapter IV of Chapter XVIII of the Code of Law of the District of Columbia and pursuant to an Act of Congress entitled "An Act to permit the merger of street-railway corporations operating in the District of Columbia, and for other purposes," approved March 4, 1925, with power subject to the approval of the Public Utilities Commission to acquire, construct, own, and operate directly transit properties within the District of Columbia and either directly or through subsidiaries in adjacent States, including the power to acquire, own, and operate the properties to be conveyed to the New Company in accordance with this agreement, and to acquire and own the stock and/or bonds of said companies and of any other company or companies engaged in the transportation of passengers by street railway or bus in the District of Columbia and adjacent States with the power to mortgage its property, rights, and franchises, and to conduct such other activities as may be useful or necessary in connection with or incident to the foregoing purposes, including the power to buy, sell, hold, own, and convey real estate within and without the District of Columbia. Said New Company when incorporated shall become and remain subject in all

respects to regulation by the Public Utilities Commission of the District of Columbia or its successors to the extent of the jurisdiction now or hereafter vested in it or them by law over corporations engaged in the transportation of passengers by street railway or bus within the District of Columbia: *Provided*, That before they are recorded, the articles of incorporation and/or any amendments thereto shall be approved by the Public Utilities Commission.

* * *

Seventh. Approval of this agreement by Joint Resolution or Act of Congress of the United States shall constitute and confer jurisdiction on the Public Utilities Commission to issue any order reasonably necessary to secure the operating and/or other economies contemplated by this merger, and to order reasonable extensions and/or reasonable abandonments of tracks and/or facilities. And said orders shall have the same legal effect and be enforceable in the same manner as other orders of said Commission.

* * *

Thirteenth. The New Company shall grant with each street-railway fare a free immediate transfer to any connecting portion of its street-railway lines within the District of Columbia, subject to reasonable rules and regulations to prevent abuse thereof. In addition, transfers between street cars and buses and between bus lines shall be granted under such reasonable terms and conditions as the Public Utilities Commission may prescribe: *Provided*, That this shall not be interpreted so as to prevent the Public Utilities Commission from establishing special fares lower than the basic rate without transfer privileges.

* * *

Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That such unification in accordance with said agreement, and each and every one of the provisions therein, be, and the same are hereby, ratified and approved, and said Capital Transit Company, when organized under the provisions of subchapter 4, chapter 18, of the Code of Law of the District of Columbia, shall have all the powers, benefits, and obligations expressed in said unification agreement, approved as aforesaid; and the Public Utilities Commission

of the District of Columbia be, and is hereby, authorized to do all such acts and things as may be necessary or appropriate on its part to carry out the provisions of said agreement and of this resolution. Nothing in this paragraph shall be construed to limit the present powers of the Public Utilities Commission.

* * *

Sec. 8. That nothing contained in this resolution shall be taken as extending or limiting the powers and duties of the Public Utilities Commission except as provided in this resolution and by said unification agreement, and all powers granted by this resolution to the Capital Transit Company shall be exercised subject to the supervision of and regulation by the Public Utilities Commission as provided by law.

Act of May 23, 1908 [35 Stat. 246; Public Law 134, 60th Cong., 1st Sess.].

* * *

Section 12. That existing transfer arrangements between the Washington Railway and Electric Company and the Metropolitan Coach Company, a corporation of the District of Columbia, shall not be terminated, except by authority of Congress; and unless said Metropolitan Coach Company shall, within one year after the passage of this Act, substitute motor vehicles to be approved by the Commissioners of the District of Columbia, for the herdics now used by it, its right to operate its line shall cease and determine: *Provided further*, That all transfers issued by the Metropolitan Coach Company shall be properly dated and punched as to time limit as provided by the rules and regulations to be made, altered, and amended from time to time by the Interstate Commerce Commission, and that unless such transfers are so dated and punched the Washington Railway and Electric Company shall not be required to receive them.

* * *

Section 16.[24] That every street railroad company or cor-

[24] Section 16 appears in the 1940 D. C. Code as Section 202 of Title 44, with the Public Utilities Commission substituted for the Interstate Commerce Commission by reason of the provisions of Section 43-207, D. C. Code, 1940, *supra*.

ration owning, controlling, leasing or operating one or re street railroads within the District of Columbia shall each and all of its railroads supply and operate a suffi- nt number of cars, clean, sanitary, in good repair, with oper and safe power, equipment, appliances and service, nfortable and convenient, and so operate the same as to e expeditious passage, not to exceed fifteen miles per ur within the city limits or twenty miles per hour in the burbs, to all persons desirous of the use of the said cars, thout crowding said cars. The Interstate Commerce mmission is hereby given power to require and compel edience to all of the provisions of this section, and to ke, alter, amend and enforce all needful rules and regu- ions to secure said obedience; and said Commission given power to make all such orders and regulations nec- ary to the exercise of the powers herein granted to it may be reasonable and proper; and such railroad com- nies or corporations, their officers and employees, are reby required to obey all the provisions of this section, d such regulations and orders as may be made by said mmission. Any such company or corporation, or its offi- s or employees, violating any provision of this section, any of the said orders or regulations made by said Com- ssion, or permitting such violation, shall be punished by ine of not more than one thousand dollars. And each y of failure or neglect on the part of such company or rporation, its officers or employees, to obey each and all the provisions and requirements of this section, or the lers and regulations of the Commission made there- der, shall be regarded as a separate offense.